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The Impact of the Criminalization of Child Abduction on the Child's Right to Maintain Personal Relations With Both Parents

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Overview of Main Findings

The impact of criminalization of child abduction on the right of the child to maintain personal relations with both parents is tightly linked to the operation of elements of both civil and criminal law in each State. But while the return of the child can be ensured with criminal law severe enforcement measures, the right of the child to maintain personal relations with both parents does not enjoy such treatment. In fact, if the child was returned against the will of the taking parent by virtue of the use of coercive measures, the child and the parent would necessarily be separated, unless she/he decides to accompany her. On the contrary, if the return of the child was refused because she would suffer from psychological harm or otherwise be placed in an intolerable situation upon return - due to a separation from the primary carer - Article 13(1)(b) would protect their relationship. But again, the right of the child to maintain personal relations with both parents would not be fulfilled. As a consequence, the assumption that the return of the child to her country of habitual residence creates the best circumstances for the realization of the right in question, is true only if the taking parent accompanies her.

From the analysis carried out in this paper, it is clear that structural characteristics of different legal traditions might affect the results that the criminalization of an offence can have. The differences in legal traditions between States can alter the outcome of return proceedings, making the child's right to personal relations with both parents uncertain. Furthermore, what is of utmost importance for the right of the child in question, is the interaction between the operations of different legal systems. Such interaction occurs when a child is abducted from a common law to a civil law legal system, and vice-versa. In fact, while in civil law countries, serious crimes are prosecuted *ex officio* but can have higher thresholds for triggering custodial sentences, in common law systems, the prosecutor has discretion on all crimes and can apply custodial sentences when it considers the offence 'serious enough'. As a consequence, the return of the child is definitely better guaranteed under common law systems, because it is possible to resort to all types of criminal law measures to enforce such return, whether the taking parent is willing or unwilling to go back. However, the right of the child to maintain personal relations with both parents can be said to be generally better ensured by civil law systems, because of the high threshold required to impose custodial sentences. The reduced use of custodial sentences makes Article 13(1)(b) defence less likely to be raised, while maintaining the option of the use of coercive measures in more difficult cases. Indeed, the criminalization of international parental child abduction in civil law countries can be seen as aiding the full realization of the right of the child to maintain personal relations with both parents. Criminalization in common law countries is, instead, to be considered an obstacle as it is more likely to lead to a separation between the abductor and the child.

The situation is different when it comes to very serious cases of international parental child abduction. For example, when the taking parent absconds with the child, the ready availability of severe criminal sanctions might be an advantage. When a child is abducted from a civil law country to a common law country and absconds there, the civil law jurisdiction might have to resort to criminal law cooperation systems such as Europol, SIRENE or Interpol to discover the whereabouts of the child, as they do not require the institution of criminal proceedings for their operation. Before the offence reaches the threshold for which a custodial sentence can be imposed – which enables the issuing of a European Arrest Warrant - it can take a considerable amount of time. As "the passage of time can have irremediable consequences for relations between the child in question and the parent who does not live with him or her"[1], the swiftness of the measures taken is pivotal. As a consequence, in very serious cases, both the return of the child and her right to maintain personal relations with both parents are better guaranteed in common law systems. The latter generally provide for severe sentences available at the discretion of the prosecutor, on a case by case basis. Severe sentences can trigger the activation of extradition procedures in a reasonable amount of time, whereby the taking parent will be forced to accompany the child back to the country of habitual residence. In this context, it is clear that, for the most complicated cases, criminalization in common

[1] *Tonello v. Hungary,* (App. no. 46524/14) - para. 66

law countries is conducive to the child's enjoyment of her right to maintain personal relations with both parents, representing an expedient rather than an obstacle.

Executive summary

This paper shows that the right of the child to maintain personal relations and direct contact with both parents is realized when the members of the nuclear family all live in the same State. This is due to the fact that personal relations constitute a pivotal element for the harmonious development of the child, and they should not be sacrificed in any way. For this reason, children subject to international parental child abduction should be returned to their country of habitual residence, favouring a return of the taking parent too. Given this assumption, the paper continues the discussion in relation to the impact of criminalization on the return of the child.

The Hague Convention attempts to secure the return of the child through a return mechanism. Such mechanism has both a restorative and a deterrent role. This is because, by restoring the *status quo ante* it also discourages would-be-abductors from engaging in the practice. The Hague Convention has definitely solved many cases of child abduction by providing redress to the left-behind parent and by also fully realizing the best interests of the child. However, Chapter 3 shows how the imposition of criminal proceedings on the taking parent in the country of habitual residence has impacted the return of the child very differently, depending on the circumstances of the case.

The civil courts' considerations on such circumstances mainly concern three subject matters: first, the family life situation of the child, its characteristics, and the relationship of each of the parents with the child; second, the types of sanctions potentially imposed on the taking parent upon return; and third, the availability of adequate protective measures in the requested State. In looking at the first and second subject matters, if issues related to criminal proceedings trigger the Article 13(1)(b) defence, some judges are considering the third subject matter. This third checking is to ensure that, in the individual case under consideration, the Convention's presumption about the best interests of the child is to be challenged. From the analysis of the selected jurisprudence the paper draws three criteria that national criminal law should meet not to trigger Article 13(1)(b). These criteria are: refraining from imprisoning primary carers, providing for a range of sanctions from moderate to severe, and providing the figure of the prosecutor with informed discretion, in order to be able to drop charges in case they are impeding the return of the child.

The paper analyses the ways in which criminal law can, on its side, contribute to the enforcement of the child's return to her country of habitual residence. It is argued that criminal law can play a retributive, deterrent, restorative and prioritizing role in the context of child abduction. These criminal law purposes are discussed in relation to the objectives of the Hague Convention to show their potential added value. At the international level, criminal proceedings can enable the activation of law enforcement mechanisms such as the European Arrest Warrant and Interpol's red notice. The paper discusses other international mechanisms that, despite falling under the 'law enforcement mechanisms' category, are actually criminal law cooperation systems that do not require the institution of criminal proceedings.

At the national level, the added value of criminal proceedings is determined by the State's national law's compliance with the criteria derived by the jurisprudence analysed in Chapter 3. The two case studies demonstrate to comply with the standards in different ways. In fact, while England has a common law legal tradition, Italy has a civil law tradition, and this difference impacts the way in which offences are dealt with. On one hand, the Italian system demonstrates to comply only in part with the said standards. In fact, the law does not allow the imprisonment of the parent in any case. This characteristic fulfils the first criterion (i.e. refraining from imprisoning primary carers) by default but makes the second criterion (i.e. providing for a range of sanctions from moderate to severe) fulfilled only in part. This is because the State is lacking the most severe of the sanctions available to States to be used in emergency cases. A parent can be sentenced to imprisonment only if found guilty of kidnapping, for which the law sets an extremely high threshold. For this reason, the possibility of issuing an Arrest Warrant also becomes very unlikely. The system, however, provides for alternative measures to detention and coercive measures to be applied as a last resort, in both incoming and outgoing cases. Finally, concerning the

third criterion (i.e. providing the figure of the prosecutor with informed discretion), although the prosecution of the offence *ex officio* does not allow any flexibility on the part of the prosecutor, it does not really make a difference because imprisonment is never an option.

On the other hand, the English system is found to fully comply with the standards. The first criterion is fulfilled by virtue of the third. In fact, judicial authorities (i.e. judges and prosecutors) must take the best interests of the child as a paramount consideration in all decisions affecting them, by law. In so doing, the prosecutor has full discretion in the prosecution of offences and case law demonstrates that imprisonment of a primary carer is almost never the case. However, the law does provide for imprisonment, as the most severe form of sanction, followed by a range of more moderate sanctions. Among the least intrusive sanctions there are civil fines, which are the most widely used. Then criminal law provides for community service when imprisonment is not considered necessary. Furthermore, the law allows coercive measures for emergency cases, used either to enforce a return order or to physically deter a taking parent caught in the act of committing child abduction. In this way, also the second criterion is satisfied.

Concerning the impact that criminalization of child abduction has on the right of the child to maintain contact with both parents is thus different in the two countries. In Italy, the impact can be said to be medium. The criminal law aim of retribution is satisfied in as far as the system provides for moderate criminal sanctions, and retribution does not necessarily require imprisonment to be effective. The aim of deterrence is not fulfilled in practice, because there is not even the threat of imprisonment and the majority of cases are dismissed. The aim of restoration through incapacitation can be said to be realised, in the sense that, in emergency situations, coercive measures can be applied to enforce the return order or to physically deter a taking parent caught in the act of committing the offence. The aim of prioritization, instead, is not fulfilled because, to issue a European Arrest Warrant, child abduction must satisfy the definition of kidnapping which has an arguably high threshold. So, *per se*, the criminalization of child abduction does not make the offence a priority. As a consequence, the Italian system benefits only from two out of four possible contributions that criminal law could make. These two contributions are retribution and restoration. Thus, the impact of criminalization of child abduction on the return of the child is medium, but positive. Its impact on the right of the child to maintain contact with both parents is positive in outgoing cases, because of the existence of coercive measures, and can be either positive or negative in incoming cases. This depends on the taking parent's decision of whether to return with the child or not.

In England, the impact of criminalization is greater. In fact, the criminal law aim of retribution is realised in terms of the range of criminal sanctions available. The aim of specific deterrence is not realized because not all taking parents are punished, but general deterrence can be said to be satisfied because of the threat of the severe sanctions available and applied when necessary. Restoration through incapacitation is also realised by virtue of the coercive measures available and the conditions under which they can be applied. Finally, the aim of prioritization is fulfilled due to the discretion of the prosecutor to adapt criminal sanctions to any kind of case, disposing of a range of moderate and severe measures. As a consequence, England enjoys all the four benefits of criminal law. The impact of the criminalization of child abduction on both the return of the child and her right to maintain personal relations and direct contact with both parents is considered to be positive. The only instance in which issues might arise, is in serious outgoing cases when the taking parent is charged with imprisonment upon return. However, the fact that England uses, recognises and enforces undertakings, allows for criminal charges to be dropped when they constitute an impediment for the child's return.

Introduction:

There are many different types of child abduction. For the purpose of this paper, the latter term represents a specific type, namely 'international parental child abduction'. The phenomenon often has its roots in complicated reasons, which are hardly ever the same. It is definitely favoured by globalization, the ease of communication and the massive immigration waves that have resulted in an increase of families with transnational elements. When these couples enter a crisis and decide to separate, "the custody of children often turns in a paternalistic fight over ownership"[2]. International parental child abduction is a widely unknown phenomenon to the general public and there is no agreed definition of this practice. For the purpose of this paper, child abduction[3] occurs when one parent decides to leave the country of habitual residence of the family and move to another with the child, without duly informing the other parent and getting the necessary legal clearing for relocation. The terminology used to refer to the former parent will be: 'taking parent'. To refer to the latter the term 'left-behind parent' will be used.

The breakdown of the family undoubtedly affects all its members in a negative way. However, the divorce and custody proceedings often risk overshadowing the fact that the ultimate victim of child abduction is the child[4]. The *United Nations Convention on the Rights of the Child*[5] represents the recognition of the international community that the child has inherent rights and dignity, independently from her[6] parents. Clearly, this creates a tension, because, at the same time, children are mostly dependent from their parents, who both have common responsibilities for their upbringing and development[7]. In fact, child abduction violates the respectful recognition of the selfhood of a child, and has its roots in notions of exclusive "rights" to a child, rather than shared responsibilities[8].

The UNCRC establishes that in all actions concerning children, their best interests should be a primary consideration[9]. The child's best interests is a horizontal concept that cross-cuts all the rights of the Convention. In child abduction, it is particularly relevant the fact that, for the full and harmonious development of her personality, the child should grow up in a family environment[10] and she shall enjoy the right to know and be cared for by her parents[11]. As a consequence, in principle, separation of the child from one or both her parents qualifies as an interference with their right to respect for family life[12]. However, the Convention recognises that couples do separate[13]. In that case, the UNCRC is based on the assumption that maintaining personal relations and direct contact with both parents is in the best interest of the child[14]. In the case of child abduction, many taking parents

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[2] Australian Family Law Council, "International Parental Child Abduction", 2018. - p. 4. [Available at: https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/International%20Parental%20Child%20Abduction.pdf].

[3] [Hereinafter: child abduction].

[4] Kruger, T. "International Child Abduction: the Inadequacies of the Law". Hart Publishing Ltd., 2011 - p. 27.

[5] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577 - [Hereinafter: UNCRC].

[6] For convenience, this paper is going to refer to the child with the feminine pronoun.

[7] *See* UN General Assembly, *supra* note 5, Art. 18(1).

[8] Australian Family Law Council "Parental Child Abduction", 1998. [Available at: https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Parental%20child%20abduction.pdf]

[9] *See* UN General Assembly, *supra* note 5, Art. 3.

[10] Ibid., Preamble.

[11] Ibid., Art. 7.

[12] ibid., Art. 16 in conjunction with Art. 9(1).

[13] Ibid., Art. 9(1).

[14] Ibid., Art. 9(3) and 10(2) UNCRC; *See also*: Doek, J., "A Commentary on the United Nations Convention on the Rights of the Child, Articles 8-9: The Right to Preservation of Identity and The Right Not to Be Separated from His or Her Parents". Brill | Nijhoff, 2006 - p.18.

act with the aim of denying the other parent contact with his/her own child, without realizing that they are mainly denying their child of a full and harmonious development[15].

In this context, States, as the basic guarantors of human rights protection, are faced with a situation that is extremely challenging to resolve in a satisfactory way. While all agree that the best interests of children should be guaranteed, it is not easy to draft rules that do precisely that.

Historically, States refused to intervene in matters involving the family even when individuals sought help, protecting the private sphere of the family from the State's reach[16]. Private international law has attempted to solve cross-border family disputes by providing for a cooperation system that could facilitate State intervention in such hostile family matters. The Hague Conference on Private International Law[17] has drafted what is still today the only international instrument that provides for a remedy to child abduction cases. Such instrument is the *1980 Hague Convention on the Civil Aspects of International Child Abduction*[18]. The Convention is based on the assumption that, in cases of child abduction, the best interests of the child generally lies in her prompt return to the country of habitual residence. The prompt return of children aims at re-establishing the status quo before the child was abducted and the contact between the left-behind parent and the child. There are only a few restricted exceptions to the prompt return of the child. These exceptions include the situation in which the child, upon return, would suffer psychological harm or otherwise would be placed in an intolerable situation. The Hague Convention, although far from uncriticized, is generally regarded as quite successful.

In recent decades, States have largely taken a more protective and often punitive posture in family matters. While the doctrine of family privacy once trumped State intervention, today States criminalize many behaviours pertaining to the private sphere[19]. Child abduction is one of those behaviours that is highly criminalised by many States in the world, and by the majority of European States. Such criminalization can have a negative impact on the return of the child under the Hague Convention. This is because if the State of habitual residence of the child criminalizes child abduction, the taking parent can risk imprisonment, which would lead to an unavoidable separation from the child. This scenario would mean re-incurring in the circumstances in which the child's rights to non-separation and contact with both parents are not fulfilled. In certain circumstances, the separation could be so harmful for the child to give rise to an exception to return under the Hague Convention. As States are required to give the best interests of the child a primary consideration, why do many of them criminalize child abduction? There must be some added value in doing so.

This paper aims at answering the following question: what is the impact of the criminalization of child abduction on the child's right to maintain personal relations with both parents? The discussion will be divided into four chapters. The first, will analyse the relevant international legal framework, mainly constituted by the UNCRC and the Hague Convention. The chapter will examine the circumstances under which the child's right to personal relations and direct contact in child abduction is better fulfilled. Then it will turn to a detailed analysis of the Hague Convention system, outlining its purposes and main features, including the return mechanism and its exceptions. The second chapter will discuss how civil courts see the presence of criminal proceedings against the taking parent in the country of habitual residence. From these considerations, it will become clear under what circumstances criminal proceedings are considered an impediment or, on the contrary, a positive expedient for ordering and enforcing a return of the child. According to the findings of this chapter, the three criteria that national criminal law should meet in order not to obstacle the return of the child will be identified. The third chapter will discuss how criminal law can contribute to enhance the chances of the child's return. After a thorough analysis of the purposes

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[15] *See* Kruger, *supra* note 4, at 58.

[16] *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 1977; *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944).

[17] [Hereinafter: HCCH].

[18] Hague Conference on Private International Law, *Hague Convention on the Civil Aspects of International Child Abduction*, 25 October 1980, Hague XXVIII - [Hereinafter: Hague Convention].

[19] Stoever, J. K., "Mirandizing Family Justice", 39 HARV. J.L. & GENDER 189, 2016.

of criminal law, the chapter will turn to explain what international law enforcement mechanisms are made available by instituting criminal proceedings. Finally, the fourth chapter will consider two case studies: Italy and England. The discussion will be focused on analysing these two State's compliance with the criteria set out in chapter two. In so doing, the added value of criminalization in each selected case study will emerge. Thus, it will be shown in what ways criminalization impacts the return of the child.

The conclusion will address the research question by arguing that the impact of criminalization on the child's right to maintain personal relations with both parents largely depends on the criminal law of each State. Importantly, it will be shown in what ways the criminalization of child abduction differently impacts the return of the child and the right in question. The interaction between different legal traditions make the impact of criminalization very diverse. In standard outgoing[20] cases, the criminalization of child abduction has a positive impact on children's rights when the requesting State[21] is a civil law country and the requested State is a common law country. This is because their right to maintain contact with both parents is better protected than if the requesting State was a common law country and the requested State a civil law one. Conversely, in more serious cases, the right of the child in question is better protected under the latter scenario.

2. International and European legal framework

2.1. CRC: Rights of the child in parental abduction cases

The Preamble of the CRC establishes certain underlying principles that should always be taken into consideration when applying the rights set forth in the Convention. Among the most relevant to international child abduction there is the recognition of the family as the child's ideal environment for her full and harmonious development[22]. As the phenomenon under consideration involves a situation in which the child does not benefit from the latter condition anymore, this section is going to discuss the rights of the child that are mostly affected, namely: the right not to be separated from parents (Article 9(1)), the right to maintain personal relations and direct contact with both parents (Articles 9(3) and 10(2)), and the right to protection against the illicit transfer and non-return of children abroad (Article 11). Importantly, due to the indivisible nature of human rights, these provisions must be read in light of the child's right to know and be cared for by her parents[23], who have common responsibilities for her upbringing and development[24]. The discussion shall proceed in the order in which the selected articles are laid down in the CRC.

2.1.1. The right not to be separated from his/her parents (Art. 9(1)):

The text of Article 9(1) CRC reads as follows:

> *"States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.*

[20] 'Outgoing cases' refers to an abduction seen from the perspective of a country of habitual residence. If a child is abducted from State A to State B, this will be an 'Outgoing case' for State A and an 'Incoming Case' for State B.

[21] If taking the example above, the 'Requesting State' refers to State A and the 'Requested State' refers to State B.

[22] *See* UN General Assembly, *supra* note 5, Preamble.

[23] Ibid., Art. 7.

[24] Ibid., Art. 18(1).

> *Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence."*

The Article establishes that States Parties should take positive measures to prevent the separation of a child from her parents "against their will". It is interesting to note that the text of Article 9(1) initially adopted by the Working Group stated that "States Parties shall ensure that a child is not *involuntarily* separated from her parents"[25]. The replacement of the term 'involuntarily' with 'against their will' was not explained during the drafting of the Convention, but it is commonly thought to refer either to the parents and the child, or to one of them[26].

From the wording of Article 9(1), it is clear that the right to non-separation is not absolute, as the separation can happen if determined by the competent authorities in the best interests of the child[27]. The provision includes two non-exhaustive situations in which separation from the parents can be deemed justifiable. The first is when the child is subject to abuse and neglect by the parents, and the second one concerns the decision on the child's residence when the parents are living separately[28]. The latter scenario applies to any divorce/separation and custody proceeding, implying that any unilateral decision by one of the parents is to be deemed illegal. In essence, the provision must be interpreted as establishing that any separation of the child from her parents must be qualified as necessary by the State to be in the best interests of the child and, as a consequence, any other person's decision on a separation is *prima facie* illegal and not in the child's interests. In principle, an unjustified separation of the child from one or both of her parents qualifies as an interference with their right to respect for family life[29].

2.1.1.1. Separation of who from who?

Article 1 CRC defines a child as "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier"[30]. However, despite the already agreed definition, the right to non-separation was originally supposed to concern only pre-school children. This is because it was already widely recognized "that early childhood is a crucial period for the sound development of young children and that missed opportunities during these early years cannot be made up at later stages of the child's life", as then later specified in General Comment no. 7[31]. However, in contrast with some delegations arguing that older children cannot be awarded the same kind of protection as very young ones, the Working Group finally decided to oppose any distinction whatsoever of children by age, stating that the essential point was that separation of a child from his parents should not occur under any circumstances[32].

Concerning the question of who the child should not be separated from, the first Polish draft of Art. 9 stated that the child should not be separated from her *mother*, save in exceptional circumstances[33]. Although child rearing

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[25] Office of the United Nations High Commissioner for Human Rights, "Legislative History of the Convention on the Rights of the Child". Reference and Research Book News, Feb 2008, Vol.23(1) - para. 21.

[26] *See* Doek, *infra* note 14, at 22.

[27] Ibid., at 20.

[28] *See* UN General Assembly, *supra* note 5, Art. 9(1).

[29] Ibid., Art. 16.

[30] Ibid., Art. 1.

[31] UN CRC Committee, UNICEF and Bernard van Leer Foundation, "A Guide to General Comment 7: Implementing Child's Rights in Early Childhood". Bernard van Leer Foundation, The Hague, 2006. - p. 8; *See also*: UN CRC Committee, *General comment No. 7 (2005): Implementing Child Rights in Early Childhood*, 20 September 2006, para. 6. CRC/C/GC/7/Rev.1.

[32] *See* Office of the United Nations High Commissioner for Human Rights, *supra* note 25, at 398 - [Hereinafter: UNHCHR].

[33] Ibid., at 388.

responsibilities have been changing over time, it is usually the mother that tends to be the primary or the sole carer of the child. For this reason, a separation from her could lead, in extreme cases, to the placement of the child in alternative care. In less extreme cases this separation is nevertheless perceived as particularly detrimental for the child and as a disruption of her family life[34]. In this context, the Greek delegation, followed by many others, noted that the role of the father for the normal development of children had been underestimated and should be emphasized more[35]. This led to the replacement of the right of the child not to be separated 'from her mother' with the right not to be separated 'from her parents'. The equal importance of mother and father is re-stated in Article 18(1) UNCRC[36], which implies that the child should not be separated from either parent, as it would not be in her best interests.

As it will become clear throughout the paper, in international child abduction cases the above discussions about the separation of young children from their primary carer are still very relevant. In fact, it is pivotal to remember that separation of the child from one of his parents not only takes place when one of them wrongfully removes or retains a child outside of her country of habitual residence, but also if, as a result of such an action, the abducting parent risks criminal prosecution in the requesting State, and thus also imprisonment.

2.1.1.2. Application of Art. 9(1) UNCRC:

The legislative history of the UNCRC reveals that the content of Arts. 9 (separation from parents), 10 (family reunification) and 11 (international child abduction) was mainly discussed when drafting the right of the child not to be separated from his/her parents, and thus they share many links. This also means that many of the different issues addressed in these provisions were actually progressively raised throughout the drafting of the three of them. When dealing with the case of divorce/separation of the parents, the Minority Rights Group proposed to extend the endeavours of States to children who are kidnapped across international frontiers by a parent. In particular, they stressed the protection to be afforded to children kidnapped in circumstances where no court order on custody existed[37]. However, it was concluded that the national and international aspects of the separation from parents should be dealt with separately. The chairman of the open-ended Working Group made the following statement:

> *"It is the understanding of the Working Group that Article 9 of this Convention is intended to apply to separations that arise in domestic situations, whereas Article 10 is intended to apply to separations involving different countries and relating to cases of family reunification[38]".*

Irrespective of the geographical location, the child who is separated from one or both parents has the right to maintain personal relations and direct contact with both parents. This concept is first addressed in Art. 9(3) UNCRC and then reiterated in Art. 10(2) UNCRC, due to the drafters' intention to deal with domestic and international separations in two different provisions.

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[34] UNICEF, "The Implementation Handbook for the Convention on the Rights of the Child", United Nations Children's Fund, 2007. - p. 124. [Available at: https://www.unicef.org/publications/files/Implementation_Handbook_for_the_Convention_on_the_Rights_of_the_Child_Part_1_of_3.pdf].

[35] *See* UNHCHR, *supra* note 25, at 390.

[36] *See* UN General Assembly, *supra note 5,* Art. 18(1).

[37] *See* UNHCHR, *supra* note 25, at 397.

[38] Detrick, S., "A Commentary on the United Nations Convention on the Rights of the Child". The Hague: Martinus Nijhoff Publishers 1999 - p.170.

2.1.2. The right to maintain personal relations and direct contact with both parents (Arts. 9(3) and 10(2) UNCRC):

Art. 9(3) UNCRC establishes that:

> *"States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests".*

Art. 10 UNCRC establishes that:

> *"A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their 4 own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention".*

During the drafting of Art. 10 UNCRC, the proposal by the Minority Rights Group to include international parental child abduction, was later backed up by the delegation of France and the United States, who stated that private family disputes which gave rise to the abduction of children across frontiers occurred more and more frequently and that no country could consider itself exempted. France argued that "preventive measures should be taken to impede that the UNCRC provisions be interpreted from a nationalistic point of view"[39]. Art. 10(2) was born out of these considerations. It is clear that the extent to which this provision is related to non-separation in the context of international child abduction is substantial, due to its explicit reference to Art. 9(1) and the circumstances under which it was discussed. As mentioned above, while Article 9(3) applies to the maintenance of personal relations and direct contact between children and parents who are separated within a State's jurisdiction, Article 10(2) addresses such right across international frontiers. There are clearly some differences in the wording of the two provisions. Nevertheless, the commentary in relation to Art. 9(3) is of direct relevance to Art. 10(2)[40].

2.1.2.1. Personal Relations and Direct Contact:

Both Art. 9(3) and Art. 10(2) establish two interrelated rights: the right to maintain personal relations and the right to maintain direct contact on a regular basis. The difference between the two provisions lies in the geographical distance between the child and the parents and in the frequency of physical contact. In fact, under Article 9(3) there must be a presumption in favour of physical contact and personal relations, unless this would be contrary to a child's best interests. By contrast, the terms 'personal relations' and 'direct contact' under Art. 10(2) cannot by definition include physical contact[41]. This means that they must be extended to include non-physical forms of contact, such as via Skype, social media, email, phone, etc.[42].

This is a crucial difference for the purpose of this paper, as what it is mainly lost in the event of an abduction is the right to 'personal relations on a regular basis' within the literal meaning and opportunities of Art. 9(3). Although no guidance is provided on the specific meaning and implications of this right alone, as separated from the right to

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[39] *See* UNHCHR, *supra* note 25, at 397.

[40] Tobin, J., "The UN Convention on the Rights of the Child: A Commentary". Oxford University Press 2019 - p. 332.

[41] Ibid.,

[42] Ibid.,

'direct contact', it is pivotal to recall the Preamble[43] and Article 7(1) UNCRC[44] to establish its autonomous existence. Moreover, especially in the early stages of life, the child needs to develop significant attachment to her parents[45], and this can hardly be done with non-physical 'direct contact' alone. These considerations definitely presume the pivotal importance of physical 'personal relations' as opposed to 'direct contact' rights: they are not the same thing. In fact, the ultimate confirmation of this right is provided by the UN Human Rights Committee[46] which states that "if the marriage is dissolved, steps should be taken, keeping in view the paramount interest of the children, to give them the necessary protection and, so far as is possible, to guarantee *personal relations* with both parents"[47].

The right to maintain contact with both parents must be read in light of both Article 2(1) and Article 4 of the UNCRC. The former establishes that 'States Parties shall *respect* and *ensure* the rights set forth in the present Convention to each child'[48]. The latter emphasises that 'States Parties shall undertake all appropriate [...] measures for the implementation of the rights recognized in the present Convention'[49]. As a result, the legal obligation of a State Party is both negative and positive in nature. On one hand, State Parties must refrain from violating this right; on the other hand, States' positive obligations will only be discharged when individuals are protected against both public and *private* agents (including a parent) that impart the enjoyment of the right to contact[50].The measures that States can take to realize the right in question can be more feasible in separations arising under their jurisdiction than compared to those across borders, as it will be discussed in the next section. In this context, Doek maintains that "one should take note of the (implicit) assumption that (in general) contact between the child and her parent(s) is in her best interests"[51] but it is also important to mention that there are particular situations in which it can be denied.

2.1.2.2. Exceptions

When comparing Art. 9(3) with the first sentence of Art. 10(2) UNCRC, it is interesting to see the difference in the wording of the justified denial of contact in the two provisions. While the former establishes that States Parties shall respect the right of the child in question 'except if it is contrary to the child's best interests'[52], the latter establishes that the child shall enjoy that right 'save in exceptional circumstances'[53]. From the drafting history, it is not clear whether this difference was casual or intentional and no definition of 'exceptional circumstances' is provided. In all cases, for this denial to be triggered, the best interests of the child must be endangered or there must be some kind of state of exception contemplated in the context of derogation clauses (such as a time of

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[43] *See* UN General Assembly, *supra* note 5, Preamble - See introductory paragraph to Section 1.1.

[44] *See* UN General Assembly, *supra* note 5, Art. 7(1) - in particular the child's right to be cared for by his parents.

[45] Winston, R., and Chicot, R., "The importance of early bonding on the long-term mental health and resilience of children". London J Prim Care, 2016. [Available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5330336/].

[46] [Hereinafter: HR Committee].

[47] UN Human Rights Committee (HRC), *CCPR General Comment No. 17: Article 24 (Rights of the Child)*, 7 April 1989 - para. 6.

[48] *See* UN General Assembly, *supra note 5,* Art. 2(1).

[49] Ibid., Art. 4.

[50] *See* Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (UN Doc. CCPR/C/21/Rev.1/Add.13, 2004).

[51] *See* Doek, *infra* note 14, at 29.

[52] *See* UN General Assembly, *supra note 5,* Art. 9(3).

[53] Ibid., Art. 10(2).

public emergency). These types of exceptional circumstances must be clearly described in the law and not be left to the discretion of the competent authorities[54].

2.1.2.3. Right to personal relations and direct contact with both parents and incarceration:

International parental child abduction amounts to a criminal offence in many countries and it may result in the imprisonment of the abductor up to several years or the payment of a fine, depending on national law. However, as it will be suggested below, imprisonment is a quite atypical sanction for this offence. First, because usually judges do not see it as beneficial for the child; and second, because international child abduction, understood as an isolated event, is usually not considered a good enough reason to justify denial of human dignity and autonomy, despite its criminalization[55]. Although the UNCRC does not tackle this aspect, States Parties are nevertheless required to provide the child with adequate opportunities to maintain direct contact with the imprisoned parent on a regular basis, in light of Art. 4 UNCRC[56]. In general, the best interests of the child, the seriousness of the crime committed by the parent and the (related) need to apply a strict regime are factors that can play a role in determining the frequency and/or duration of such contact[57].

The CRC Committee has not addressed the theme of criminal proceedings either, but it has made 'children of incarcerated parents' the topic of one of its Days of General Discussion[58]. For the purpose of this paper, this section is assuming that the child will not live in the detention facility with the offender *a priori*, because of the unlikelihood of the event. In this regard, the Committee recommends that States Parties seek, wherever possible, to situate the incarcerated parent at a facility close to his/her child's residence to facilitate the child's right to visit and contact with him/her. Furthermore, States Parties should facilitate, as far as technically possible, further regular contact between the child and the incarcerated parent(s) through telephone, video-conference and other means of communication and ensure that any associated costs are non-prohibitive[59].

However, when considering the phenomenon of international parental child abduction, the only cases that shall terminate with imprisonment are the very serious ones, with a high risk of re-abduction or harm to the child, since the use of criminal proceedings should be seen as a last resort,[60]. Thus, these are other examples of the 'exceptional circumstances' under which the contact rights between the abducting parent and the child might be substantially limited or denied.

2.1.2.4. The right to leave any country and to enter one's own country: Art. 10(2) UNCRC compared to Art. 12 ICCPR

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[54] *See* Tobin, *supra* note 40, at 333.

[55] Luna, E., "The Overcriminalization Phenomenon", American University Law Review, 2005. Vol. 54 issue 3 - p. 714. [Available at: https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?referer=https://www.google.nl/&httpsredir=1&article=1707&context=aulr].

[56] *See* Doek, *infra* note 14, at 28.

[57] *Messina v. Italy*, 28 September 2000, Reports 2000-X, - paras. 70 and 73.

[58] Day of General Discussion "Children of incarcerated parents" 30 September 2011. Salle XVII, Palais des Nations.

[59] CRC Committee, "Report and Recommendations on the Day of General Discussion on 'Children of Incarcerated Parents", 2011, para. 46. [Available at: https://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2011/DGD2011ReportAndRecommendations.pdf].

[60] *See* Kruger, T., *supra* note 4, at 188.

The second sentence of Art. 10(2) expands on States Parties' obligations to respect and ensure the maintenance of personal relations and direct contact with both parents. In fact, to this end, the provision establishes that States shall respect the right of the child and her parents to leave any country, including their own, and to enter their own country. This formulation can be traced back to Articles 12(2) and 12(4) *International Covenant on Civil and Political Rights*[61] which establish the same right. As there is little guidance on Art. 10(2) UNCRC, it has been argued that the comments available on Art. 12 ICCPR should apply to Article 10(2) UNCRC too[62]. As in the ICCPR, the right of the child and her parents to leave any country, including their own "shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order, public health or morals or the rights and freedoms of others and are consistent with the other rights recognised in the UNCRC"[63]. This statement, in fact, adequately reflects the exceptionality of the circumstances under which the right to contact between children and parents should be limited or denied, as mentioned in the first sentence of the provision.

Under Art. 12(3) ICCPR, States Parties have both positive and negative obligations, i.e. the obligation to respect the right of every person to leave any country including his/her own and the obligation to issue valid travel documents to permit such movement[64]. Interestingly, as far as regards the latter scenario, the HR Committee has expressed deep concern about some States' discriminatory practices. For example, in Iran the Committee noted that mothers cannot give permission for the issuance of a passport for a child under the age of 18; only the child's father or grandfather hold this kind of authority. As a consequence, "in a case in which the parents are separated and the mother of the child resides in another country, the child may only leave Iran to visit his/her mother if the father permits the child to do so"[65]. In this context, it is clear that States Parties must refrain from allowing one parent/family member to interfere with the child's right to maintain direct contact and personal relations with a parent she is separated from.

Two observations: first, as mentioned above, it is true that the first sentence of Art. 10(2) UNCRC assumes that personal relations between children and parents living in two different States are usually difficult, and that is why alternative means of communications should be used to enjoy that right. Second, despite the first observation, the second sentence of Art. 10(2) establishes that towards the end of maintaining contact, States "shall respect the right of the child and his or her parents to leave any country including their own". As a consequence, if as a result of the criminalization of international parental child abduction a parent is not able to go back to his/her own country and the child is not freely able to leave it, the measure could have the effect of hindering the right to personal relations between the abductor and the child after her return to the country of habitual residence, as it will be discussed in the next chapter.

2.1.2.5. Family unity:

The separation of a child from his or her family can have debilitating effects on a child's physical and emotional well-being and many seriously impede a child's development[66]. The topic of family unity in Art. 10(2) UNCRC only refers to family reunification of migrants and refugees. However, the provision shows that the principle applies also

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[61] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171 - Art. 12(2) and 12(4) - [Hereinafter: ICCPR].

[62] *See* Tobin, *supra* note 40, at 334.

[63] *See* UN General Assembly, *supra* note 61, Art. 12(3).

[64] Joseph, S., and Castan, M., "The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary", 2013. [Available at: https://opil-ouplaw-com.ezproxy.leidenuniv.nl:2443/view/10.1093/law/9780199641949.001.0001/law-9780199641949-chapter-1#law-9780199641949-div2-21].

[65] CRC Committee, CO Iran, CRC/C 15, Add.254 para. 24.

[66] *See* UN CRC Committee, *infra* note 31, para. 18.

in the event of a separation between the child and her parent(s), by making reference to Art. 9(1). To link everything tighter, the UNCRC Preamble always makes clear that the child should grow up in a family environment, in an atmosphere of happiness, love and understanding[67]. Finally, international human rights law has long recognised the family as the "natural and fundamental group unit of society" and requires States to adopt measures to protect and facilitate family unity[68]. The European Court of Human Rights[69] has also recognised that in case of a separation/divorce "family ties may only be severed in very exceptional circumstances and that everything must be done to preserve *personal relations* and, if and when appropriate, to 'rebuild' the family"[70]. As a consequence, for the purpose of this paper, family unity will be understood as a context in which the child is able to maintain physical personal relations and direct contact with both parents, even if they are divorced/separated.

2.1.3. Protection against illicit transfer and non-return of children abroad (Art. 11):

The text of Art. 11 UNCRC reads as follows:

> *1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.*
>
> *2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.*

The Article essentially prohibits the illicit transfer and non-return of children abroad by any person, including a parent, and encourages States Parties to fight against this practice with the promotion of the conclusion of bilateral or multilateral agreements or accession to already existing ones. By the time the Working Group got to discuss the protection against the illicit transfer and non-return of children abroad, this issue had already been widely codified under the Hague Convention[71], which is going to be thoroughly discussed in the next chapter. Although it is clear from the drafting history that Article 11 UNCRC is concerned with the illegal abduction of children by one parent, the text of the article does not explicitly states so. As a consequence, under the UNCRC, for the removal/retention to be wrongful it must only be in violation of the applicable law in the State from which the child was taken, and not necessarily in violation of custody rights, as the Hague Convention prescribes[72].

2.1.3.1. State's obligations and appropriate measures to be taken:

Article 11(1) UNCRC imposes an obligation on States to take measures to 'combat' international child abduction. The choice of the term 'combat' is ambiguous. The term should be understood as requiring States to take all proactive measures to prevent the practice, while the effectiveness principle demands that the requirement must extend to an obligation to also take restorative and rehabilitative measures for children victims of international child abduction[73]. The provision should be read in light of Article 4, which requires States to 'undertake all *appropriate* legislative, administrative and other measures' for the implementation of each right of the UNCRC. In this regard, the CRC Committee has recommended that States take legislative measures to expressly prohibit international

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[67] UN General Assembly, *Universal Declaration of Human Rights*, Res. 217(III)(A) A/810 (1948) - Preamble.

[68] Ibid., Art. 16(3).

[69] [Hereinafter: ECtHR].

[70] *Gnahoré v. France*, no. 40031/98, § 59, 2000-IX.

[71] *See* HCCH, *supra* note 18.

[72] *See* Tobin, *supra* note 40, at 374-375.

[73] Ibid., at 375.

child abduction and that the perpetrators receive *appropriate penalties*[74]. The meaning of 'appropriate penalties' has never been addressed. As a consequence it is clear that States enjoy significant discretion in determining what measures are appropriate, including criminal ones.

2.1.3.2. Promotion of the conclusion of bilateral or multilateral agreements or accession to existing agreements:

As far as it concerns the second paragraph, it is worth recalling that, since the beginning, the UNCRC was seen to serve as a benchmark for cooperation agreements between States in the future[75]. For this reason, Article 11(2) establishes the conclusion of bilateral and multilateral agreements as the measures to combat the illicit transfer and non-return of children abroad. The CRC Committee has not offered many comments on the nature of this obligation, but it is clear that States do not enjoy much discretion in their compliance with the provision. In fact, if States are to comply with the obligations set out in Article 11(1), then Article 11(2) demands that "as a minimum they must accede to a relevant existing agreement"[76]. In particular, the Committee has repeatedly urged States to ratify the Hague Convention, as it is the most widely ratified child abduction treaty and the only one that creates among States Parties an effective system of cooperation aimed at returning the child to her place of habitual residence[77].

2.1.4. Findings

This section has argued that the child should not be arbitrarily separated from her parents, neither by a public nor by a private agent, unless when it is in her best interests. This is because the child has the right to be cared for by her (both) parents who have common responsibilities for her upbringing. Furthermore, the child needs to develop strong attachments to her parents and grow up in a family environment for her full and harmonious development. This condition can clearly not be met if one parent lives in a different State, because of the impossibility to secure *personal relations* on a regular basis with the child. As a result, in international child abduction cases, the child who is illicitly transferred abroad must be returned to her State of habitual residence, possibly accompanied by the taking parent. For the full realization of the child's right to maintain personal relations and direct contact with both parents, the members of the nuclear family should live in the same State. As a consequence, the next chapters will only discuss criminalization in relation to the return of the child with the taking parent. The paper will address the right to personal relations again in the conclusions.

However, the UNCRC does not provide any hint regarding the measures that States should adopt in securing the return of the child. For this reason, the paper is now turning to the analysis of the most relevant treaty dealing with the civil aspects of international parental child abduction, which will show the only system in place to ensure the return of the child to her country of habitual residence.

2.2. The 1980 Hague Convention system

[74] UN Committee on the Rights of the Child, *Concluding Observations: Egypt*, 15th July 2011, CRC/C/EGY/CO/3-4 - para. 56.

[75] *See* UNHCHR, supra note 25, at 397.

[76] *See* Tobin, *supra* note 40, at 381.

[77] *See* for example: CO Algeria, CRC/C/DZA/CO/3-4 para. 51; CO Egypt, CRC/C/EGY/CO/3-4 para. 56; CO Democratic Republic of Congo, CRC/C/15/Add.153 para. 45.

The Hague Convention is not a human rights treaty, but rather a private international law instrument of a civil procedural nature, protecting individuals on an objective basis[78]. In particular, the Convention, attempts to safeguard the interests of children by protecting them from the harmful effects of a wrongful removal or retention, through a system of international cooperation. This is achieved by restoring children's familial stability securing their prompt return to the place of habitual residence[79]. In so doing, the Hague Convention ensures the full realization of the child's right to maintain personal relations and direct contact with both parents, reflecting the ideal circumstances for the harmonious development of the child envisaged by the UNCRC.

Notably, since 2003, the EU has exclusive competence on international family law matters, including international child abduction taking place within its borders. The instrument regulating these aspects at the European level is Regulation (EC) No 2201/2003 or better known as Brussels II bis Regulation[80]. The latter agreement does not modify the core of the Hague Convention but it does impact certain relevant aspects of it. As a consequence, since both of the case studies analyzed in this paper are part of the EU, the Regulation will be discussed only in as far as relevant for the impact of the criminalization of international child abduction on the return of the child.

2.2.1. Key terms: Custody and Habitual Residence

Under the Hague Convention, a removal or retention is wrongful when a parent violates the other parent's rights of custody[81] of a child up to 16 years old[82]. Such rights must have been actually exercised at the time of the wrongful act[83]. The definition of custody in the Hague Convention is quite unique and defined under Article 5(a) of the Hague Convention which says to "include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence"[84]. More concretely, the meaning of custody has been associated with the renowned case of *Abbott v. Abbott*[85], in which the U.S. Supreme Court held that a parent with visitation rights coupled with a *ne exeat*[86] order has right of custody. In this scenario, a court in the requested State must decide whether the laws of the State of habitual residence provide a right that equates to a right of custody under the Convention for the parent who is left behind[87].

The concept of 'habitual residence' is of crucial importance as the return remedy of the Convention is not available if a State from which a child is taken is not found to be the child's habitual residence[88]. The term, though not defined in the Hague Convention, is a factual inquiry focusing on the place that is the center of the child's day-to-day life[89]. Indeed, it is important to bear in mind that the State of habitual residence might not be the child's place of birth or the State of which she is a national. However, it is widely agreed that it is where there is a degree of

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[78] *Neulinger and Shuruk v. Switzerland*, (App. No 41615/07), Grand Chamber - para. 145.

[79] *See* HCCH, *supra* note 18, Art. 12.

[80] Council Regulation (EC) No 2201/2003 of 27 November 2003 *Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility*, Repealing Council Regulation (EC) 1347/2000 [2003] OJ L338/1 - [Hereinafter: 'the Brussels II bis Regulation'].

[81] *See* HCCH, *supra* note 18, Art. 1(a).

[82] *See* HCCH, *supra* note 18, Art. 4.

[83] *See* HCCH, *supra* note 18, Art. 3(b).

[84] *See* HCCH, *supra* note 18, Art. 5(a).

[85] *Abbott v. Abbott*, 130 S. Ct. 1983 (2010).

[86] A *ne exeat* order typically prohibits a parent, or both parents, from removing a child from the jurisdiction of the court or prohibits moving a child across an international border without the permission of the court or the other parent.

[87] *C. v. C.* (Minor: abduction: rights of custody abroad), I W.L.R. 654 (Q.B. 1989).

[88] *Holder v. Holder*, 392 F.3d 1009, 1014-15 (9th Cir. 2004).

[89] Perez-Vera, E., "Explanatory Report", in *3 Hague Conference on Private International Law, Acts and Documents of the Fourteenth Session, Child Abduction*, 1982, p. 441.

settled purpose. In *Re Bates*, in determining the habitual residence of a ten years old child, the court argued that "all that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled"[90].

The assessment of a very young child's habitual residence can be more insidious precisely because of a lack of settlement signs. In fact, in *A v. A. and another,* in which the habitual residence of the youngest child (out of three) was disputed, the court stated that "the social and family environment of an infant or young child is shared with those upon whom [the child] is dependent". Hence, to decide on an infant's country of habitual residence, it is necessary to assess the integration of that person or persons in the social and family environment of the country concerned[91]. As already discussed in relation to the UNCRC, the concerns about the return of infants in the context of the criminalization of international child abduction is very delicate, precisely because they tend to depend on their primary carer more than older children.

2.2.2. Purposes of prompt return

The Hague Convention was created in light of the international child abductions taking place in the 1980s, which were mainly committed by fathers being concerned about not having access to their children after divorce[92]. This was due to tacit child custody practices that tended to grant sole custody to the mother, leaving fathers with little to do other than taking the law in their own hands and abduct the child to another country to seek new custody arrangements.

As a consequence, the purpose of the Convention can be said to be twofold:

First, the 'return mechanism' plays a deterrent role for would-be-abductors by restoring the *status quo ante*. This move renders the abduction ineffective by default, supposedly discouraging future abductions[93]. As it will be discussed in the next section, the Convention provides for three exceptions under which the child may not be returned to the State of habitual residence, which have been criticised as weakening the deterrent effect of the Convention[94].

Second, prompt return is encouraged because the court of the State of habitual residence is considered better positioned to solve the merits of the proceedings. The fact that, under the Hague Convention, jurisdiction over matters of parental responsibility is automatically linked to the child's habitual residence prevents the risk of resorting to unlawful action to move the child to another Member State in order to establish artificial jurisdictional links with a view to obtaining custody of a child[95]. This practice is called *forum shopping* which refers to circumstances where parties in a case rush to start proceedings in the jurisdiction which is most favourable to their case[96].

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[90] *Re Bates*, 1989 WL 1683783 - para. 13.

[91] *A v A and another* (Children: Habitual Residence) (Reunite International Child Abduction Centre intervening) [2013] UKSC 60 [2013] 3 WLR 761.

[92] Hester, M., "The Three Planet Model: Towards an understanding of Contradictions in Approaches to Women and Children's Safety in Contexts of Domestic Violence", Jessica Kingsley Publishers 2011 - p. 847.

[93] Biniari, E., et al., "The EU Child Return Procedure: in search of efficiency", 2017, p. 28. [Available at: http://www.ejtn.eu/Documents/Team%20Greece%20Semi%20Final%20B.pdf].

[94] Sthoeger, E., "International Child Abduction and Children's Rights: Two Means to the Same End", Michigan Journal of International Law 2011, vol. 511 - p. 32.

[95]Directorate General for Internal Policies, "Illegal removal of children: Brussels II a and the Hague Convention", 2010, p. 7. [Available at: http://www.europarl.europa.eu/RegData/etudes/IDAN/2010/432736/IPOL-JURI_NT(2010)432736_EN.pdf] - [Hereinafter: Directorate General].

[96] Schuz, R., "The Hague Child Abduction Convention: A Critical Analysis". Hart Publishing 2013 - p. 303

In this regard, the Brussels II bis Regulation differs from the Hague Convention as it aims at intensifying the effectiveness of the above mentioned purposes within the EU. In particular, the Regulation is committed to eradicate the possibility of an unjustified non-return of the child, and as a consequence also of *forum shopping*, with no exceptions allowed, unless the competent court decides so[97]. The said competent court will always be the one in the State of habitual residence, as its jurisdiction is strengthened by virtue of an 'overriding mechanism'. Such mechanism gives them the last word on the child's return[98]. The decision of the court in the State of habitual residence, in fact, overrides any non-return order that may have been issued by the court of the requested Member State. This is a crucial difference with the Hague Convention, as under its provisions the court of the requesting State has no ongoing jurisdiction if a return is not ordered[99].

2.2.3. Exceptions

The exceptions to the return of the child are established in Articles 12 (settlement of the child), 13(1)(a) (consent or acquiescence of the left behind parent), 13(1)(b) (grave risk), 13(2) (child's objection) or 20 (protection of human rights and fundamental freedoms) of the 1980 Hague Convention. These defences include a variety of situations in which it is proved that it would not be in the best interests of the child to be returned to her country of habitual residence. For the purpose of this paper, only the defences most often related to the criminalization of international parental child abduction will be discussed, namely Articles 12(2) and 13(1)(b)[100].

Before turning to the analysis of the two selected defences, it is necessary to point out that Article 12(1) Hague Convention emphasises that the return of the child should be sought through summary proceedings in which the competent authorities shall act expeditiously[101]. When exceptions to return are raised by the taking parent, investigations to ascertain the circumstances of the case have resulted in very lengthy proceedings, which amounted to delays or denials of the child's prompt return only because of the mere passage of time[102]. In fact, courts are not encouraged to assess whether the return of the child is in her best interests (i.e. carrying out a full best interests assessment). Rather, courts must evaluate the concept of the best interests of the child in the light of the exceptions provided for by the Hague Convention, particularly those concerning the passage of time and the existence of a 'grave risk'[103]. In this regard, the Brussels II bis Regulation tightens up the six-week period mentioned in Article 11 of the Convention, making it a compulsory requirement[104].

Indeed, the first defence under consideration in this paper is Article 12(2), which establishes that, if more than one year has passed since the wrongful removal or retention occurred and the child has become settled in her new environment, return can be denied[105]. As mentioned in relation to the concept of habitual residence, no uniform understanding has emerged with regard to the concept of settlement and on whether it should be interpreted

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[97] Beaumont, P. R., and McEleavy, P. E., "The Hague Convention on International Parental Child Abduction". Oxford University Press 1999 - p. 16.

[98] *See* Brussels II bis, *supra* note 80, Art. 11(8).

[99] *See* Directorate General, *supra* note 95, at 10.

[100] HCCH, "[Draft] Guide to Good Practice on Article 13(1)(b) of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction", October 2017. [Available at: https://assets.hcch.net/docs/0a0532b7-d580-4e53-8c25-7edab2a94284.pdf].

[101] *See* HCCH, *supra* note 18, Art. 11.

[102] *See* e.g.: ECtHR, *R.S. v. Poland* (App. no. 63777/09); *López Guió v. Slovakia* (Application no. 10280/12).

[103] ECtHR, "Factsheet: International Child Abduction", May 2019. [Available at: https://www.echr.coe.int/Documents/FS_Child_abductions_ENG.pdf].

[104] *See* Brussels II bis, *supra* note 80, Art. 11(3).

[105] *See* HCCH, *supra note* 18, Art. 12.

literally or in accordance with the policy objectives of the Convention[106]. The latter approach assumes a very restrictive interpretation with a firm commitment to return the child to her place of habitual residence in most cases. Importantly, in the context of the criminalization of international child abduction, this defence has mostly been raised in connection with Article 13(1)(b).

Article 13(1)(b) establishes the so called 'grave risk' defence. This provision states that if there is a grave risk that the child's return would expose her to physical or psychological harm or otherwise place her in an intolerable situation, return may not be ordered[107]. In fact, according to Article 18 of the Convention, even if the grave risk exception is established, courts still retain discretion in deciding whether to order the return of the child or not[108]. The wording of the provision makes it "forward-looking", in that it focuses on the circumstances of the child upon return and on whether those circumstances would expose the child to a grave risk[109]. Because "grave risk" and "intolerable harm" are not defined in the Convention, the provision has been applied to a variety of situations, including domestic violence, economic factors, risks associated with the child's State of habitual residence and cases in which the taking parent faces criminal proceedings in the country of habitual residence[110]. Given its broad coverage and the lack of detailed guidance on how to implement the grave risk exception, jurisprudence shows how courts have been interpreting it differently over time.

The approaches vary in accordance with the perception that courts have about the assessment of the best interests of the child. The Hague Convention implicitly tries to strike a balance between the general best interests of children not to be taken from their place of habitual residence and the need of the individual child to be protected[111]. However, this balancing exercise is probably easier in theory than in practice. The ECtHR, from its authoritative position, has substantially influenced the grave risk exception's interpretation trends. In its ground-breaking judgment in *Neulinger and Shuruk v. Switzerland*[112].

The case concerned a mother who had wrongfully removed her two years-old son from Israel to Switzerland following the breakdown of her relationship with the father. The Swiss Federal Court rejected the mother's claim that there was a grave risk that returning the child to Israel would place him in an intolerable situation. Such claim was based on the fact that she risked facing criminal proceedings in Israel, and the Court argued that there was no evidence that she would have actually been criminally sanctioned[113]. The Grand Chamber of the ECtHR, in reviewing the case, decided that to enforce the return order would amount to an unjustifiable interference with the mother and the child's right to respect for private and family life as protected by Article 8 ECHR. Moreover, the ECtHR argued that five years had elapsed since the mother's wrongful removal during which period the child had settled well in Switzerland and had not seen his father. Thus, it was accepted on a majority of 16-1 that there was no benefit to be gained from returning the child to an uncertain family situation[114]. In this way the ECtHR has questioned the relationship between the general best interests of children to return and the best interests of the

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[106] HCCH, INCADAT: Settlement of the Child. [Available at: https://www.incadat.com/en/convention/case-law-analysis].

[107] *See* HCCH, *supra* note 18, Art. 13(1)(b).

[108] *See* HCCH, *supra* note 18, Art. 18.

[109] *See* HCCH 2017, *supra* note 100, para. 54.

[110] *See* Schuz, *supra* note 96, at 303.

[111] Liefaard, T., and Sloth-Nielsen, J., "The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead". Koninklijke Brill 2017. - p. 218-219.

[112] *See Neulinger*, *supra* note 78.

[113] Ibid., para. 34.

[114] Ibid.,

child in a particular case, seemingly encouraging courts to carry out an accurate, yet lengthy, assessment in each case[115].

Focusing on the best interests of the individual child means losing sight of what the objective of the Convention is, namely the return of the child. In fact, many argue that Article 13(1)(b) has been working as an all-encompassing excuse for not issuing a return order, resulting in a defence very much prone to 'abuse'[116]. In turn, they say, an inaccurate application of Article 13(1)(b) weakens the Convention's deterrent effect as demonstrated by the high percentage of international child abductions still occurring today[117]. In fact, the ECtHR is now back to its pre-Neulinger approach as shown in the recent judgment of *X v. Latvia*[118], where it states that a *prompt* return of the child to her habitual residence must be assumed to be in the best interests of the child[119]. For this reason, there is no need for a full assessment because the courts in the requesting State will take care of the merits of custody[120].

In order to both avoid the unnecessary passage of time and decrease the chances of non-return of the child, it is now clear that the defences must be interpreted narrowly[121], and that the standard for establishing a grave risk of harm under Article 13(1)(b) must be high and the burden of proof clear[122]. However, it is important to point out that a restrictive approach to defences does not necessarily deter would-be-abductors and might not decrease the consistently high numbers of abductions. This is because, today abductions are mostly committed by female primary carers, and a possible explanation for their continuous increase is that these are the types of wrongful removals/retentions that the Convention has not succeeded in deterring[123]. As it will be shown in the next chapter, the nexus between primary carer abductors and criminalization is considerably strong and greatly influences return proceedings.

2.2.4. The role of Central Authorities

Contracting States must designate a Central Authority to discharge the duties which are imposed by the Convention for its implementation[124]. Article 7 of the Convention sets out the broad range of responsibilities that are accorded to these bodies, for the promotion of cooperation with other authorities and between them to secure the prompt return of the child[125]. Interestingly, Art. 7(a) establishes that Central Authorities are in charge of taking

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[115] *See* Liefaard, *supra* note 111, at 218-219 .

[116] *See* e.g.: Johnson, T. A., "The Hague Child Abduction Convention: Diminishing Returns and Little to Celebrate for Americans", *New York University Journal of International Law and Politics*, vol 33, Issue 1, 2000. See also: Siehr, K., "The 1980 Hague Convention on the Civil Aspects of International Child Abduction: failures and successes in German practice", *New York University Journal of International Law and Politics*, vol. 33, Issue 1, 2000.

[117] Ibid.

[118] *X. v. Latvia* (Application No 27853/09).

[119] *See* Beaumont, *supra* note 97, at 16.

[120] *See* HCCH, *supra* note 18, at 16.

[121] *See* e.g. Bevando Sobal, B., and Hilton, W. M., "Article 13(b) of the Hague Convention Treaty: Does It Create a Loophole for Parental Alienation Syndrome—an Insidious Abduction?", 2000. [Available at: https://www.jstor.org/stable/40707613?seq=1#page_scan_tab_contents].

[122] See ECtHR, *MR and LR v. Estonia* (App.No. 13420/12); and *Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction,* 22–28 March 2001, para. 4.3, [Available at: www.hcch.net].

[123] See Schuz, supra note 96, at 303; *See* also: Weiner, M. H., "International Child Abduction and the Escape from Domestic Violence", 2000, p. 680 [Available at: https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=3674&context=flr].

[124] *See* HCCH, *supra* note 18, Art. 6.

[125] *See* HCCH, *supra* note 18, Art. 7.

appropriate steps to help locate a child who has been wrongfully removed or retained[126]. For this purpose, a well-resourced Central Authority will have arrangements through Interpol, local police or Central Authority personnel on call, to provide 24 hour contact[127]. In this way, Central Authorities provide a point of contact between the civil and criminal enforcement mechanisms dealing with international child abduction.

The responsibilities set out in the text of the provision are said to be non-exhaustive, as there are many other inexplicit tasks that they are required to carry out[128]. For the purpose of this paper, the other interesting aspects of the Central Authorities' role are going to be extracted from other HCCH guidelines and national documents. In fact, concerning the return of the child, the *HCCH Guide to Good Practice[129] on Article 13(1)(b)* reveals that Central Authorities can assist in dismissing criminal proceedings when they constitute an impediment for the return of the child. They can help in various ways, depending on applicable criminal laws and procedures in the requesting State[130]. The Central Authority does not become involved in the substantive aspects of any criminal proceeding. However, it is able to point out in general terms their advantages and disadvantages[131]. Good practices for Central Authorities in these cases include three possible actions.

First, Central Authorities can inform the prosecution authorities and criminal courts of the fact that, if a taking parent faces criminal prosecution in the requesting State, judges may take this into account when deciding upon the return of the child[132]. It is worth noting that international cooperation was traditionally the province of judicial authorities and the fact that Central Authorities of one State can now directly contact prosecution authorities of another State is considered a positive development[133]. This is due to the fact that judicial cooperation is subject to specific conditions aimed at ensuring transparency, that yet might make cooperation slower. Differently, the cooperation between Central Authorities and prosecutors lands itself to more flexibility and swiftness[134].

Second, Central Authorities can exchange information about the possibility of waiving or discontinuing criminal proceedings in the individual case. In the case in which the proceedings can only be dismissed at the hands of the left-behind parent, the Central Authority can also contact him/her[135]. In this case he/she will be informed about the risks of instituting criminal proceedings and consider encouraging him/her to drop the charges or helping the taking parent to fulfil any condition for the charges to be dropped, if possible, under internal criminal laws and procedures[136]. This aspect is of particular importance because if the prosecutor cannot dismiss the case on its own motion, the outcome of the case might depend in part on the left-behind parent alone. As it will be further

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[126] *See* HCCH, *supra* note 18, Art. 7(a).

[127] Hague Conference on Private International Law, "Good Practice, Part 1 - Central Authority Practice", 2003. [Available at: https://assets.hcch.net/upload/abdguide_e.pdf] .

[128] ibid.

[129] [Hereinafter: GGP].

[130] *See* HCCH GGP Art. 13(1)(b), *supra* note 100, para. 250 .

[131] Dutch Ministry of Security and Justice, "Guide for International Cases of Child Abduction to Foreign Countries Central Authority for International Children's Issues", 2013, p. 5 [Available at: https://www.kinderontvoering.org/sites/default/files/media/nl/docs/downloads/verdragen/Handreiking-%20UITGAANDE%20ZAKEN-ENGELSE%20VERSIE.pdf].

[132] ibid.

[133] Gully-Hart, P., "Cooperation between central authorities and police officials : the changing face of international legal assistance in criminal matters", Revue internationale de droit pénal, 2005/1-2 (Vol. 76), p. 32. [Available at: https://www.cairn.info/revue-internationale-de-droit-penal-2005-1-page-27.htm#no9].

[134] Joubert, C., and Bevers, H., "Schengen Investigated: A Comparative Interpretation of the Schengen Provisions on International Police Cooperation in the Light of the European Convention on Human Rights", *Kluwer Law International*, 1996.

[135] *See* HCCH GGP Art. 13(1)(b), *supra* note 100, para. 250 .

[136] Ibid.

discussed in the last chapter, this situation raises the question of the validity of 'undertakings' made by the left-behind parent, formally swearing to drop the criminal charges against the taking parent.

In fact, turning to the final consideration regarding Central Authorities' cooperation, in the case where the return of the child is ordered, Central Authorities should confirm whether the criminal charges have been dropped or are still in place[137]. This last check works as a safety net both in the case in which the prosecutor did not manage to dismiss the case yet, and in the case in which undertakings were not respected by the left-behind parent.

Either way, the contribution of Central Authorities in removing the obstacles impeding the return of the child can be considerable, if well implemented, yet not decisive. Unfortunately, it appears that some Central Authorities have refused to assist, or failed to assist, in some of their tasks, such as locating a child. Some Central Authorities have also been criticised for not acting quickly to locate a child[138]. It is now even clearer how any delay, mistake or inaction of Central Authorities on the ring of procedures may cause a potential setback for all of the stages, and the passage of time becomes a real threat[139]. Indeed, Central Authorities play an important role in determining the length of the proceedings depending on how expeditiously they act, influencing in part the outcome of return proceedings.

2.2.5. Chapter 2 Findings

This chapter has argued that the right of the child to maintain personal relations and direct contact with both parents should be both protected and ensured by States and that only in exceptional circumstances should be denied, if it is in the best interests of the child. From the analysis of this right, as laid down in both Article 9(3) and Article 10(2) UNCRC, it is now clear that personal relations on a regular basis, unlike direct contact, are harder to ensure when parents live in two different States. Article 10(2), in fact, embodies the concept of family unity as the most desirable one for the rights of the child to be fully realized. As mentioned in the first section, the right of the child to maintain personal relations and contact with both parents is only fully realized when the family members live in the same State. The UNCRC does not provide much guidance on the issue of international parental child abduction under Article 11. As a consequence, it is assumed that in these cases, the return of the child to her country of habitual residence would best satisfy her right to maintain personal relations and direct contact with both parents.

The 1980 Hague Convention attempts at securing the return of the child and it is the only existing instrument that provides for a measure that safeguards the rights of the child in international parental abduction. Indeed, the Convention provides for a 'return mechanism' that aims at restoring the *status quo ante* by returning the child to her country of habitual residence within six weeks from the wrongful removal or retention. In addition to this 'restorative' purpose, the mechanism is also supposed to have a deterrent role for would-be-abductors and thus limiting the practice of *forum shopping*. Furthermore, the Convention provides for three exceptions to return, two of which are directly relevant for situations in which the return of the child is at risk due to the taking parent facing criminal proceedings upon return with the child. However, the ECtHR jurisprudence and a considerable amount of scholars argue that the defences must be interpreted narrowly with a view to returning the child. An important part of the Hague Convention system is constituted by the Central Authorities', whose responsibilities include assisting other competent authorities in locating the child and in setting the circumstances for which a return is possible. Particularly, concerning criminal proceedings, Central Authorities help in disentangling many of the difficulties

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[137] Ibid.

[138] See HCCH GGP1, supra note 127, at 47.

[139] Telli, K., "The Role of the Central Authorities in the Application of the 1980 Hague Convention on Child Abduction: A Critical Analysis of a Genuine Area of Public International Law", 2002, p. 764. [Available at: https://dergipark.org.tr/download/article-file/155593].

inherent in waiving or dismissing them, through their cooperation with international law enforcement mechanisms (e.g. Interpol), prosecutors and the police.

Neither the Hague Convention nor the Brussels II bis Regulation deal with criminal consequences for the abductor[140]. From the facilitating role attributed to the Central Authorities by the Convention, it seems that criminal proceedings against the taking parent in the country of habitual residence would constitute an impediment for the return of the child. However, the impact of the criminalization of child abduction has not been addressed in any detail. Given the lack of information on this last aspect, the paper is now going to show what civil courts look at when confronted with a case where criminal proceedings were initiated in the country of habitual residence against the abductor, and what weight they give to them.

3. The HCCH, ECtHR and other civil courts of the world perspective: the actual impact of criminalization on the return of the child

In order to find out how civil courts of requested States see the presence of criminal proceedings in the country of habitual residence, this chapter is going to analyse the jurisprudence of different civil courts around the world. National judgments will be drawn from two of the most updated case-law databases, namely INCADAT (the official database of the Hague Conference) and the British and Irish Legal Information Institute (BAILII). The analysis is also going to discuss some ECtHR judgments where appropriate which can provide relevant insights on the procedural aspects of several decisions and confirm or rebut the approach of national courts. Furthermore, the discussion is going to be complemented, by the HCCH recommendations and good practices for competent authorities. This chapter is going to be divided in three sections corresponding to the three main subject matters that judges look at in deciding on the return of the child. These three subject matters are usually taken into consideration because they can give rise to a defence under Article 13(1)(b), thus representing an impediment for the return of the child. Every section is going to describe a number of cases and the particular considerations made in relation to criminal proceedings. Each section will conclude with an analysis of these considerations. Finally, the chapter will derive three criteria that national criminal law should meet not to constitute an obstacle for the child's return.

Premise:

As stated by the HCCH Guide to Good Practice on Article 13(1)(b), this paper assumes that the mere risk or existence of criminal proceedings does not create an impediment for the return of the child *per se*[141]. This is because the child, being subject to international child abduction is always going to suffer from psychological harm, as a result of both the sudden change of environment and the separation from one of the parents. As a consequence, the mere fact that the child would suffer if the taking parent cannot return with her is not considered as passing the 'grave risk test'. Furthermore, for the sake of clarity, it is important to bear in mind that the three subject matters can often overlap, and thus, what is discussed in one section can be repeated also in another section.

3.1 Family life

Considerations about the characteristics of the family and its members is the first aspect that courts take into account. This includes also the type of relationships that link (or separate) them. If the separation between the taking parent and the child does not amount to a grave risk of harm or otherwise place her in an intolerable

[140] *See* Tobin, *supra* note 40, at 382.

[141] *See* HCCH Art. 13(1)(b), *supra* note 100, para. 290.

situation, courts would usually not look any further. The Article 13(1)(b) defence would just not be considered an option.

National courts:

The first case analysed in this section is *Decision of the Supreme Court, 1 December 1999*[142], in which a mother abducted her child from Cyprus to Poland, her home country. When the father realized that his wife and child were not going to go back to Cyprus, he applied for the return of the child under the Hague Convention. In the return proceedings, the mother claimed, *inter alia*, that she was unable to return to Cyprus because of the criminal proceedings she was going to face upon return. The Polish Supreme Court, in examining whether the issue was serious enough to cause psychological harm to the child or place her in an intolerable situation, stated that:

> *"the perpetrator's fear of being held criminally liable for this act after his/her return is not considered such an objective obstacle. That is because when abducting he/she should have been aware of the consequences of the act. The problem is more complicated in cases of small children abducted by a person who dominated in the child's hitherto life (usually the mother)"*[143].

This statement explains three important aspects. First, it confirms the assumption of the paper that the mere risk of facing criminal proceedings is not enough to satisfy the high threshold set by Article 13(1)(b). Second, it acknowledges that the young age of the child is a complicating factor. Third, the fact that the taking parent is the primary carer adds to the frustration of the young child in being deprived of a fundamental person in her life. The court recognized that the above mentioned factors could actually cause psychological harm or otherwise place the child in an intolerable situation. Nevertheless, the judge argued that a return order could still be issued because, *inter alia*, the father was seen fit to care for the child in case the mother would not go back or face criminal proceedings[144].

The second case under consideration in this section is *N.P. v. A.B.P.*[145]. The case is about a mother who had wrongfully removed her two children aged 7 and 4 from New Caledonia, a French territory in the Pacific Ocean, to Canada. The father, in applying for the return of the children under the Hague Convention, he also instituted criminal proceedings against the mother. During the civil proceedings, the mother sought to raise the grave risk defence under Article 13(1)(b) because of two reasons: first, the father had previously trafficked her and forced her into prostitution; second, because of the criminal proceedings instituted against her, she was not going to be able to return with the children. The judge considered the fact that the children were too young to be separated from her primary carer. Furthermore, the fact that the father was clearly unable to care for the children given his criminal enterprise, played a decisive role. As a consequence, return was refused and the children were able to lawfully move with the mother in Canada.

ECtHR:

From the ECtHR perspective, the right to family life (Article 8 ECHR) literally represents the right to live together[146]. As a consequence it would be reasonable to expect that when deciding on international child abduction cases

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[142] *Decision of the Supreme Court, 1 December 1999*, I CKN 992/99.

[143] *Ibid*., at 8.

[144] *Ibid*. at 7-8.

[145] *N.P. v. A.B.P.*, 1999 R.D.F. 38 (Que. C.A.).

[146] ECtHR, *Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence,* Council of Europe/European Court of Human Rights, 2019 - p. 51[Available at: https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf].

characterised by the impediment constituted by criminal proceedings against the taking parent, it analyzed the specificities of the family and their members.

The case of *Neulinger and Shuruk v. Switzerland*[147] is on point. The facts have already been outlined in the previous chapter (see Section 1.2.3) and will not be re-stated, but it is worth recalling the fact that the court took an unusual approach by carrying out an in-depth best interests assessment of the child. The Court, in examining whether the Swiss Federal Court had violated the right to family life of the mother and the child in ordering a return to Israel, it considered the following aspects. First, that the young age of the child plays a role in determining his best interests especially in relation to the mother. Second, and closely connected to the first point, the mother happened to be the primary carer, as in most cases[148]. As a consequence, a separation between the two would definitely cause a high degree of harm to the child. Nevertheless, the deciding factors concerning the impact of criminal proceedings on the return of the child were stated as follows:

> *"Even supposing that she agreed to return to Israel, there would be an issue as to who would take care of the child in the event of criminal proceedings against her and of her subsequent imprisonment. The father's capacity to do so may be called into question, in view of his past conduct and limited financial resources. He has never lived alone with the child and has not seen him since the child's departure"[149].*

It is thus clear that, before considering the risk of imprisonment of the mother, the Court gave particular weight to the fact that the father was deemed incapable of caring for the child, due to his behaviour, financial instability and his relationship with the child. As a consequence, with no doubt, the characteristics of both parents and the child, added to their relationship to each other made out the threshold of Article 13(1)(b), as return to Israel was not ordered again.

Analysis

This section has shown that both national courts and the ECtHR have taken into consideration the family characteristics and relationships to assess whether the criminal proceedings faced by the taking parent upon return could establish a 'grave risk' exception under Article 13(1)(b). The main considerations that have emerged in this realm are: first, whether the taking parent is the primary carer; second, the age of the child; and third, whether the left behind parent has the capability/resources to take care of the child in the case in which the mother was not going to return with the child or she was imprisoned.

3.2. Types of criminal sanctions

The sanctions against the taking parents as a result of a wrongful removal or retention vary according to the specific circumstances of the case. There are a whole range of measures that spans from very lenient sanctions to considerably intrusive ones. This section will explore what kind of sanctions are considered as constituting an impediment for the return of the child.

National courts:

The case of *Tabacchi v. Harrison*[150] concerns a mother who abducts her child from Italy to the U.S. following an argument with the father. Before the abduction, the father, despite having shared custody of the child, had sought

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[147] *See Neulinger*, *supra* note 78.

[148] *See Neulinger*, *supra* note 78, para. 138.

[149] *See Neulinger*, *supra* note 78, para.150.

[150] Tabacchi v. Harrison, 2000 WL 190576 (N.D.Ill.).

a *ne exeat* order but when it came to enforce it was already too late. The father filed an application for the return of the child and also instituted criminal proceedings against the mother in Italy. The court considered the fact that the mother was the primary carer and that the child was only 4 years old, thus in particular need of her care. However, the court also stated that "no court has allowed the pendency of criminal proceedings in the home country to justify failure to return the child to the country of habitual residence"[151]. The judge questioned whether criminal proceedings in Italy can lead to actual imprisonment and stated that there was no evidence that the father's criminal complaints would have led to an actual separation between the mother and the child (i.e. no risk of custodial sentences)[152]. As a consequence, the Article 13(1)(b) defence was rebutted.

In the case of *Q.*[153], the mother abducted her two young children from France to Scotland. At the beginning the mother sought to abscond the children at her parents' house in Scotland. Then, the father travelled to Scotland and, in discovering the whereabouts of the children, he also found out that they had not been going to school. The father, upon return to France, filed an application for the return of the two children under the Hague Convention and instituted criminal proceedings against the mother[154]. In the return proceedings, the mother argued that the children would have suffered psychological harm if they were going to be separated from her as a result of criminal proceedings in France. Her lawyer showed evidence to the court that she could face imprisonment[155]. By contrast, *Q.*'s lawyer stated that "there was little risk that R.S. [the mother] would be imprisoned"[156]. As a consequence, given the little risk of a custodial sentence, an actual separation between the mother and the children was unlikely. This does not mean that the mother would have not faced any criminal sanction, but as long as she was not necessarily separated from the children it could not give rise to an Article 13(1)(b) defence.

In the case of Re. L., a mother abducted her two young children from Florida (U.S.) to Denmark and then to the UK. A grand jury in Florida charged the mother with the criminal offence of international parental kidnapping because she had absconded with the children in the UK for a long time. In addition, the grand jury issued an arrest warrant against the mother to locate the children. The mother was brought before the competent High Court of Justice in the UK for the return proceedings and stated that by then there had arisen a grave risk that the return of the children to Florida would place them in an intolerable situation. The lawyer of the father countered this argument by stating that criminal proceedings were not creating an impediment for the return, because she was going to be extradited anyways due to the arrest warrant. This type of criminal measure can be said to be quite different from standard criminal proceedings, as its implementation crosses the borders of the country's jurisdiction and aims at reaching the offender wherever he/she is. In this regard, the judge stated that he did not accept the mother's submission. Furthermore he maintained that:

> *"indeed it seems to have been the warrant for arrest pursuant thereto which triggered the international police activity that led to the location of the mother and children in England"[157].*

From this statement, it is clear that the judge did not have a negative opinion on the warrant. Rather, he saw it as instrumentally positive for the location and thus for the return of the children.

ECtHR:

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[151] Ibid., at 4.

[152] Ibid., at 13.

[153] *Q., Petitioner* [2001] SLT 243.

[154] Ibid., para. 37.

[155] Ibid., para. 60.

[156] Ibid., para. 48.

[157] *Re L. (Abduction: Pending Criminal Proceedings),* [1999] 1 FLR 433 - at 6.

This section is, once again, going to briefly refer to the case of *Neulinger and Shuruk v. Switzerland*[158]. Being a leading ruling, it contains a variety of issues worth to be addressed in different parts of this paper. The facts are not going to be re-stated. It only fits to mention the Court's acknowledgment that, although not even the Central Authorities managed to have this clear, the mother was realistically risking twenty years of imprisonment if she was going to return with the child to Israel[159]. As a consequence, this aspect emerged as being decisive taken in conjunction with the fact that the child was very young and the mother was the primary carer.

In *Cavani v. Hungary*[160], the family went on vacation in Hungary, which is the home country of the mother. At the end of the vacation, the family was supposed to return to Italy, but the mother decided not to go back and to keep the children with her. The father returned to Italy by himself and applied for the return of the two children to Italy. The Court is requested to evaluate whether the Hungarian authorities made adequate and effective efforts to secure compliance with the applicants' rights to their reunification. The father argued that the authorities failed to take the appropriate measures that the circumstances required, as the mother had proved opposing the return at all costs. The Hungarian Government replied that the authorities and the police had done everything in their power to locate the children and to return them to Italy. The Government also argued that coercive measures were not used because, as a rule, they are only ordered as a last resort where the imposition of a fine on the abducting parent had proved ineffective[161]. The Court held that coercive measures were not the only option available to the domestic authorities, which could have imposed further and heavier fines on the first applicant's ex-wife[162]. Furthermore, the Court argued that, although coercive measures against children are not desirable in this sensitive area, the use of sanctions must not be ruled out in the event of unlawful behaviour by the parent with whom the children live[163].

Analysis:

It is interesting to note that in all the selected cases, the taking parent was always the mother who was also the primary carer. So it is clear that family relationships always come as a standard consideration, before anything else. In terms of the types of sanctions, each case reveals important details. First, the fact that criminal sanctions might not lead to imprisonment is considered as a good enough reason to rebut a grave risk defence (*Tabacchi v. Harrison*). The fact that the mother might have to face some other criminal sanctions is not relevant. (*P.Q.*). Second, if there is a risk of imprisonment, judges might look at the potential length of the sanction (*Neulinger*). Third, the use of coercive measures is seen as desirable as a last resort (*Re. L.*), but other effective sanctions/fines must be imposed. The ECtHR in *Cavani v. Hungary* made clear that if the state does not take the appropriate steps to facilitate the reunification between the left behind parent and the child, the inaction constitutes an obstacle for the return of the child. In particular, it argued that civil sanctions (such as fines) can fill the gap between the criminal moderate and coercive measures.

3.3. Existence of adequate and effective measures in the State of habitual residence

The judgment of *MS v. P.S*[164] provides for an extremely accurate introduction to this section. In evaluating the international abduction of a young child by an English mother from Israel to the UK, who would have faced criminal proceedings if returned with the child, the English High Court of Justice, stated that:

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[158] *See Neulinger, supra* note 78.

[159] Ibid., para. 150.

[160] *Cavani v. Hungary* (Application No 5493/13).

[161] Ibid., para. 46.

[162] Ibid., para. 59.

[163] Ibid., para. 52.

[164] *MS v. PS* [2015] EWHC 2880 (Fam).

> *"If [..] the mother's evidence is sufficient to establish the Article 13(b) exception, the court then turns to consider the available protective measures, which in most cases include undertakings offered by the parent who is seeking the child's return. If the available protective measures (including the undertakings offered) are sufficient to ameliorate the risk that it is asserted exists, then they negate the defence raised (such that the exception is found not to be established)"*[165].

It is thus clear that, despite the establishment of the exception, the court can use its discretion to issue a return order if the requesting State offers adequate protective measures, as maintained by the HCCH[166]. Under the 1980 Hague Convention protection measures can include mirror orders, safe harbor orders and undertakings, which should ensure a safe return of the child[167]. However, the first two will not be discussed in this paper because of their lack of relations with the criminalization of child abduction.

As mentioned in the above quote, the most widely used measures in cases involving criminal proceedings against the taking parent are undertakings. Undertakings can be defined as official promises, concessions, or agreements given to a court to ensure that criminal charges against the taking parent will be dropped so as to allow him/her to go back with the child[168]. However, whether and to what extent a left-behind parent may influence the criminal proceedings through undertakings depends on national law. Whether that parent actually has the power to have the proceedings dismissed or simply has the right to request prosecuting authorities to dismiss the case varies among different jurisdictions[169].

National courts:

The case of *Sabogal v. Velarde*[170] is about a mother who abducted her two children from Peru to the U.S, after the father had retained them preventing her from exercising her right to parental responsibility. When the father learned about the wrongful removal, he instituted criminal proceedings against the mother and applied for a return order of the children to Peru. The U.S. District Court of Maryland, in considering whether the mother's claims could give rise to a defence under Article 13(1)(b), looked at the relationship that the father had with the children and recognised that he was indeed an abusive parent, as the mother had contended. As a consequence, the Court found that the children would have been exposed to psychological harm and placed in an intolerable situation if they were returned to Peru and the mother was going to be imprisoned[171]. Nevertheless, the Court decided to return the two children to Peru despite the evidence of psychological abuse suffered at the hands of the father and the existing criminal proceedings against the mother, on the basis of undertakings. The undertakings included, *inter alia*, that the father had to drop the criminal charges against the mother before the children could be returned. As the status of undertakings under Peruvian law was not clear, the court also asked for a court order confirming the undertakings of the father.

The case of *Re T.*[172], concerns an English mother who abducted her three children aged 7, 4 and 2 years old from Italy to the UK. The father instituted criminal proceedings against her in Italy and applied for the return of the

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[165] Ibid., para. 22.

[166] *See* HCCH, GGP Art. 13(1)(b), *supra* note 100, para 289.

[167] Ibid., para. 292 .

[168] Garbolino, J. D., "The Use of Undertakings in Cases Arising Under the 1980 Hague Convention on the Civil Aspects of International Child Abduction", 2016, p. 1. [Available at: https://www.fjc.gov/sites/default/files/2016/Use%20of%20Undertakings_0.pdf].

[169] Ibid., at 9.

[170] *Sabogal v. Velarde* 106 F.Supp.3d 689 (2015).

[171] Ibid., at 14.

[172] Re T [2010] EWHC 3177 (Fam)

children. The mother, *inter alia*, raised the Article 13(1)(b) defence arguing that the children would have suffered psychological harm by being returned. The court took into account the young age of the children, the fact that one of the children suffered from autistic spectrum disorder and that the father had been abusive towards all of his family members. Moreover, the judge stated that the option of the children being separated from their primary carer was ruled out[173]. As a consequence he looked at the possibility of protective measures both for the children and for her. The judge found that there were no adequate protective measures in Italy that could have protected both the children and the mother from physical and psychological harm. In particular, the fact that the recognition and enforceability of undertakings under the Italian system is not clear, despite the father's promises to drop criminal proceedings against her[174], return was not ordered.

In light of the subject matter of this section, it is considered relevant to look at the criminal proceedings present in *Re L.* once again*[175]*. As mentioned in the previous section, during the return proceedings, the mother stated that criminal proceedings constituted a grave risk for the return of the children to Florida because of a potential separation from her. The judge stated that it was predictable that criminal proceedings would have been instituted against her as she had absconded with the children for a long time. The judge considered the hypothetical, yet realistic, situation in which, upon arrival in the US, the mother was going to be arrested by the police, as the forward looking nature of Article 13(1)(b) requires. He stated that he had no reason to believe that the prosecutor would not take into consideration the best interests of the children when deciding on her sanctions as a primary carer[176]. As a consequence, the standard of proof set by Article 13(1)(b) of the Convention had not been met.

ECtHR:

In the case of *Maumousseau and Washington v. France[177],* in which the mother abducted the daughter from the State of New York to France, the Court was required by Mrs. Maumousseau to assess, *inter alia*, whether there had been a violation of Article 8 in conjunction with Article 6 ECHR (right to a fair trial). This was because, before the Aix-en Provence Court of Appeal, the mother had sought to claim that she would have not been able to accompany the child back to New York due to the criminal proceedings instituted against her by the father. But the American Court dismissed this claim. The ECtHR judgment reports a letter of the French Central Authority stating that the father refused mediation and wished to continue with the criminal proceedings[178]. So it is clear that the father had no intention of dropping the criminal proceedings. The ECtHR declared the mother's claim unfounded only when it learned that the public prosecutor certified that no warrant had been issued for her arrest[179]. However, it is interesting to see how the dissenting opinion of Judge Zupancic joined by Judge Gyulumyan relied on the fact that, because the Dutchess County Family Court in New York had decided to deprive the French mother of her custody, her offence amounted to child kidnapping which is a Class E Felony. They concluded that "the arrest on the probable cause that she had committed a Class E Felony would be wholly within the discretion of the local police" and that such an arrest could lead to imprisonment[180].

Analysis:

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[173] Ibid., para. 21.

[174] Ibid., para. 64

[175] *See* Re L., *supra* note 157.

[176] *See* Re L., *supra* note 157, at 8.

[177] *Maumousseau and Washington v. France*, (App. No 39388/05).

[178] *See* Re L., *supra* note 157.

[179] *See* Re L., *supra* note 157, para. 92.

[180] *Maumousseau and Washington v. France* (App. No 39388/05) - Dissenting opinion of Judge Zupancic joined by Judge Gyulumyan, at 42.

From the analysis of these very different cases, it is not surprising that undertakings have lately been seen as 'procedural issues' due to their vague scope and unofficial nature[181]. The status of undertakings is ambiguous and this problem was identified by an authoritative study on the outcomes for children returned following an abduction. According to the research, 66.6% of the undertakings made were not complied with (even if the undertakings are 'mirrored' by a court order) which can leave the returning parent and the child in a very vulnerable position[182]. Moreover, as Beaumont points out, the downside of protective measures is that they often only refer to the protection of the child, and not the protection of the abducting parent (usually the mother)[183]. In fact, depending on the circumstances of each case, when undertakings result in recognition and enforcement difficulties in the country of habitual residence, they might constitute a further impediment for the return of the child (*Re T.*,). Because of these difficulties, however, some judges might require a court order formally proving that undertakings will be respected (*Sabogal v. Velarde).* If such proof is not asked for or if courts do not recognise such orders, the child could end up facing a grave risk of harm upon return[184].

For this reason, the discretion power of prosecutors and the police is an important element, and in some circumstances the only potential expedient available for dropping criminal proceedings. In the case of *Re L.*, in light of the available judgment, the conclusion of the judge seems ambiguous. This is because he argued that he had "no reason to believe that the prosecutor would have not taken into consideration the best interests of the children when deciding on her sanctions as a primary carer". In the lack of information about what made him so sure that the prosecutor would have taken into account those factors, it might be argued that such an assumption can be a hasty conclusion. In fact, the approach of the ECtHR in *Maumousseau* results more balanced as it ruled out the possibility of a grave risk arising from criminal proceedings only when it learned that the prosecutor had confirmed so.

3.4. Chapter 3 findings: Criteria according to international standards

The section on 'family life' has shown that the relationship between the taking parent and the child is particularly important. This is so, especially in light of the relationship that the other parent has with the child. The fact that criminal proceedings in the country of habitual residence would separate the primary/sole carer from the young child is considered giving rise to a defence under Article 13(1)(b). As a consequence, the criterion that criminal law should meet not to constitute an impediment for the return of the child rests in refraining from imposing sentences that could separate the child from her primary/sole carer.

Criterion n. 1: *No imprisonment of the primary/sole carer, except in exceptional circumstances.*

The second section shows that judges look at the types of criminal sanctions imposed on the taking parent in deciding whether there is a grave risk of psychological harm or otherwise place the child in an intolerable situation. These considerations have amounted to an Article 13(1)(b) defence when the taking parent risks imprisonment in the country of habitual residence of the child. If imprisonment is not an option, other criminal sanctions are not considered relevant. On the other hand, when it comes to coercive measures applied in the requested State, criminal sanctions are considered appropriate and desirable as a last resort. Interestingly, before applying coercive measures, States must demonstrate that they have taken all possible measures to return the child, including fairly severe fines/sanctions. If they cannot prove this, their inaction has constituted an impediment for such purpose. In fact, it is pivotal to point out that, in order for coercive measures not to be the only option, civil sanctions should be able to have a considerable impact too. As a consequence, it can be stated that the second criterion that criminal law should meet in order not to constitute an impediment for the return of the child lies in providing a range

[181] *See* Schuz, *supra* note 96, at 198.

[182] Reunite, "The Outcomes for Children Returned Following an Abduction", 2003. [Available at: http://www.reunite.org/edit/files/Library%20-%20reunite%20Publications/Outcomes%20Report.pdf].

[183] *See* Beaumont, *supra* note 97, at 10.

[184] *Walsh v. Walsh*, No. 99-1747 (1st Cir. July 25, 2000).

of moderate and severe sanctions, if civil sanctions are not harsh enough. The sanctions should escalate according to the degree of wrongful behaviour of the parent, reaching the most severe degree (imprisonment) only as a last resort.

Criterion n. 2: *Providing for sanctions ranging from moderate to severe, where the latter are imposed as a last resort.*

Finally, the last section has considered the subject matter of adequate protective measures in the context of criminal proceedings. From the analysis it is clear that civil courts tend to see the use of undertakings as a quite reliable measure to override the risk of criminal proceedings against the taking parent upon return. The problem, however, is that undertakings are not recognised/enforceable in all jurisdictions and can potentially contribute to the upholding of an Article 13(1)(b) defence. As a consequence, the real determining factor is whether the offence is prosecuted *ex officio* or not. If the offence is prosecuted *ex officio* then the prosecutor can do nothing but proceed with the prosecution, provided that it does not fulfill the dismissal criteria. If it is not, the prosecutor has discretion on what cases to prosecute. In other words, the powers that national law endows the prosecutor with, are decisive for whether an offence can be dropped at the request of the 'victim'. Thus, the last criterion that criminal law should meet in order not to obstacle a return of the child is to equip the prosecutor with discretion powers.

Criterion n. 3: *Empowering the prosecutor with discretion*

In this context, the paper is now going to assess whether the criminalisation of child abduction can add anything to the realization of the objectives of the Hague Convention.

4. Purposes of criminal law and international mechanisms of law enforcement:

While the Hague Convention is the only instrument with the praiseworthy purpose of protecting the child, in some cases its measures for the return of the child have revealed themselves as too lenient. This lack of power, in some cases, carries the consequence of poor enforcement results, failing to reach the Convention's objectives. Thus, in this scenario, criminal law measures can help or provide other avenues for the realization of such objectives. This chapter will discuss how criminal law can enhance the chances of a return of the child to his place of habitual residence. This chapter is divided into two sections. The first one is going to discuss the main purposes of criminal law using the most relevant academic literature available and some case-law. The second one is going to present the main existing international law enforcement mechanisms. These will be divided according to their sphere of influence, being them regional or purely international.

4.1. Purposes of criminal law

This section aims at clarifying how can criminal law enhance the possibility of the child's return.

Criminal law's purposes traditionally focus on the punishment of the wrongdoer, but they do not necessarily protect the child. Criminal law theory is very fragmented and presents a variety of different schools of thought. The most traditional one (i.e. retributive) maintains that punishment is the most important aim of criminal law, if not the only one[185]. At the other end of the spectrum we find utilitarians to whom punishment is rather a means to an end[186]. The conflict between retributivism and utilitarian views explains, in part at least, why punishment has come to

[185] Bennet, C. D., "Retributivist Theories", 2013. [Available at: http://eprints.whiterose.ac.uk/95450/2/WRRO_95450.pdf]

[186] Douglas, H., "Retribution in criminal theory", 2000, p. 970. [Available at: https://heinonline-org.ezproxy.leidenuniv.nl:2443/HOL/Page?lname=&public=false&collection=journals&handle=hein.journals/sanlr37&men_hide=false&men_tab=toc&kind=&page=959&t=1561308373].

cover not only the exaction of a fair price for the wrongdoing, but also such separate aims such as rehabilitation, denunciation, together with harm-reductive means such as deterrence (specific and general) and incapacitation[187]. It is important to bear in mind that examination of the purposes suggested for the criminal law will show that each of them is complex and that none may be thought of as wholly excluding the others[188].

The following paragraphs explain each of these purposes of criminal law and their potential effect on the return of the child.

4.1.1. Retribution

Moore, one of the most renowned theorists of retributive justice, argues that punishment is the only purpose of criminal law[189]. For example, Moore does not believe that one of the aims of criminal law is to reduce crime (i.e. deterrence), but he only focuses on the fact that the wrongdoer has to suffer, proportionally to what he has done. In the same tone, he argues that "[P]unishment is justified if it is given to those who deserve it. Desert is a sufficient condition of a just punishment, not only a necessary condition"[190]. By contrast, Hart argues that social purposes can never be single or simple, or held unqualifiedly to the exclusion of all other social purposes. Importantly, an effort to make them so, can result only in the sacrifice of other values which are also important[191]. However, not to be forgotten is the fact that some of the other social purposes mentioned, are already (more or less) secured by the civil proceedings under the Hague Convention (e.g. deterrence and restoration), and as a consequence some States maintain the perspective that the retributive aspect of the wrongful removal or retention is to be emphasised by increasing penalties, including deprivation of liberty, to punish the parent for his/her action[192].

Hampton argues that there are two categories of wrongful action: the first is a wrongful action (potentially resulting in a wrongful loss) that requires a punishment, and the losses of which require compensation; and the second one is a wrongful action (potentially resulting in a wrongful loss) that does not require a punishment, but the loss of which still require compensation[193]. From a children's rights perspective, which is being increasingly endorsed by judges when sentencing a parent (and in particular a primary carer), the crime falls under the second category. This is because the central focus and the real victim of international child abduction is the child. So while it is generally not in the best interests of the child to have a parent criminally prosecuted and potentially sanctioned, it is in the child's best interest to be 'compensated' for the harm suffered. In fact, for instance, the British sentencing Guidelines state that:

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[187] Federation Press, "The Purposes of Criminal Law" in *Criminal Laws in Australia.* [undated] - p. 4 [Available at: https://www.federationpress.com.au/pdf/Lanham%20Ch1B.pdf].

[188] Hart, H. M., "The aims of the Criminal Law", p. 401. [Available at: https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2758&context=lcp].

[189] *See* Moore, *supra* note 189, at 43.

[190] Ibid.

[191] *See* Hart, *supra* note 188, at 401.

[192] Senato della Repubblica Italiana, *Ordine del Giorno*, Wednesday 6th April 2016, 604th and 605th Seduta Pubblica, p. 7 [Available at: https://www.senato.it/service/PDF/PDFServer/BGT/969916.pdf].

[193] Hampton, J., "Correcting Harms versus Righting Wrongs: The Goal of Retribution", 1992, p. 1664. [Available at: https://heinonline-org.ezproxy.leidenuniv.nl:2443/HOL/Page?lname=&public=false&collection=journals&handle=hein.journals/uclalr39&men_hide=false&men_tab=toc&kind=&page=1659&t=1561316884].

> *"For offenders on the cusp of custody, imprisonment should not be imposed where there would be an impact on dependants which would make a custodial sentence disproportionate to achieving the aims of sentencing"*[194].

The aims of sentencing are thus not considered to be the punishment of the parent as an end in itself. In particular, imprisonment is not considered as strictly necessary. It is, nonetheless, important to bear in mind that the approaches taken by States are very different, and not all of them might agree with/follow this line of thought.

4.1.2. Deterrence

Deterrence is an old idea and it has been discussed in academic writing at least as far back as the eighteenth-century works by Adam Smith (1776), Jeremy Bentham (1789), and Cesare Beccaria (1764). There are three core concepts embedded in theories of deterrence: that individuals respond to changes in the certainty, severity, and celerity (or immediacy) of punishment. Interestingly, in the criminological tradition, deterrence is often characterized as being either general or specific. While *general deterrence* refers to the idea that individuals respond to the threat of punishment, *specific deterrence* refers to the idea that individuals are responsive to the actual experience of punishment[195].

Concerning the impact of criminalization of international child abduction on the return of the child, it is important to consider whether it would affect the general or the specific deterrence of abductors. This is because, if the effect of criminalization is to generally deter parents from abducting their children, the threat of criminal sanctions would be enough. For this kind of deterrence to be effective, the subjective risk of apprehension must be increased[196]. However, for people to be deterred by the threat of punishment they must know the law. Deterrence research suggests that the ordinary citizen is largely unaware of the operation of the justice system and that this substantially weakens the deterrent effect of changes in the law or in the judicial implementation of the law. Empirical research in relation to the operation of the 1980 Hague Convention confirms that parents may not be aware that removing or retaining the child without consent of the other parent was unlawful[197].

In fact, it is important to consider whether the State is punctual in enforcing sanctions and in what situations. If it is not punctual or it only punishes recidivists, then would-be-abductors would understand that criminal law only 'threatens', but does not 'bite'. Indeed, if sanctions are not imposed, the criminal law deterrent effect would not add anything to the Hague Convention deterrent effect[198]. As a consequence, it may work better if the purpose of the criminalization of international child abduction is to specifically deter abductors. In this case all parents who commit this crime must be appropriately punished with the result that they will be less likely to commit it again. In turn, this would also create a more general effect because the punishment of those who commit international child abduction will serve as an example to potential offenders, proactively deterring them from engaging in the same behaviour[199].

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[194] Sentencing Council, "Imposition of Community and Custodial Sentences Definitive Guideline", 2016, p. 7. [Available at: https://www.sentencingcouncil.org.uk/wp-content/uploads/Imposition-definitive-guideline-Web.pdf].

[195] Chalfin A. and McCrary J., "Criminal Deterrence: A Review of the Literature", 2017, p. 6 [Available at: https://eml.berkeley.edu/~jmccrary/chalfin_mccrary2017.pdf].

[196] Judicial College of Victoria, "General Deterrence", 2015. [Available at: http://www.judicialcollege.vic.edu.au/eManuals/VSM/15327.htm].

[197] *See* Schuz, *supra* note 96, at 38.

[198] Ibid.,

[199] Ontario Ministry of Children, "Deterrence Strategies", 2018. [Available at: http://www.children.gov.on.ca/htdocs/English/professionals/oyap/roots/index.aspx]

4.1.3. Incapacitation as a means to Restoration

Restoration, in theory, aims at paying greater attention to the position of the victim, by getting offenders to face up to the harm they have inflicted[200]. The term 'restoration' literally points to a concept of reparation and remedy. However, criminal justice systems focus primarily on punishing offenders for the crimes they committed, virtually merging restoration with another criminal law purpose that is 'incapacitation'[201]. This is true especially in the case of child abduction, as more or less proper forms of restoration are already provided by civil proceedings (e.g. mediation, return mechanism, etc.). Although most criminal justice systems do strive to achieve restoration, often times victims have little chance to even see parts of their loss (material or symbolic) restored[202]. In fact, criminalisation not only fails to provide any remedy, but it cannot even neutralise the effects of the abduction[203]. This is because once the abduction has taken place, usually the child's psychological harm cannot be reversed.

In fact, the international community has reached a consensus on the fact that the best solution to pay the victim back for the damage suffered, is to 'restore' the *status quo*, by returning the child to his/her place of habitual residence. In this context, criminal law can help the restoration objective of the 1980 Hague Convention (i.e. return of the child) in extreme cases, with its incapacitation purpose. For example, when a taking parent repeatedly refuses to comply with a return order criminal proceedings can promote the activation of coercive measures, including detention[204]. In fact, in this sense, criminal and civil remedies can be complementary to achieve the return of the child[205].

4.1.4. Prioritization/visibility

A more general aim of criminal law, as compared to civil law, is the ability to attract the priority in police resources and the advanced procedures (eg telephone interception, listening devices) that apply in the investigation of criminal offences[206]. In fact, one of the main purposes of the criminalization of child abduction is considered to rest precisely on this potential, in particular when the abductor, due to the fear of his/her children being returned, hides with the children, or hides the children alone[207]. In this context, criminal proceedings can activate the international law enforcement mechanism to which this paper is now going to turn to.

4.2. Relevant international law enforcement mechanisms and their contribution

The previous section has outlined all the criminal law purposes relevant for this paper. As it was made clear, these purposes are embracing a wide range of objectives. It can thus be expected that the existing law enforcement mechanisms are not only in place to 'find and punish' the offender, as retributivists argue. Rather, they are also used to deter, restore and prioritise crimes. This section is briefly going to explain how these mechanisms work

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[200] *See* Family Law Council, *supra* note 8, at 26.

[201] *See* Federation Press, *supra* note 187, at 9.

[202] MEREPS Expert Group, "Restoration", [undated]. [Available at: http://mereps.foresee.hu/en/felso-menue/restoration/].

[203] *See* Family Law Council, *supra* note 8, at 33.

[204] See e.g. ECtHR, *Paradis and Others v. Germany*, App. No. 4783/03; *Maumousseau and Washington v. France* (App. No 39388/05).

[205] Lowe, N., "'Abductors Keepers': Is the International Law on Child Abduction Working?", *International Law Discussion Group Summary*, Chatham House, 2013. - p.9. [Available at: https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/310113summary.pdf].

[206] *See* Family Law Council, *supra* note 8, at 33.

[207] *See* Re L., *supra* note 157.

and assess whether criminal proceedings enhance or diminish the child's chances of return. The section is divided in accordance with the law enforcement mechanisms' geographical operation: 'Europe' and 'International'.

4.2.1. Europe

Europol:

Europol is the official law enforcement agency of the European Union. It aims at strengthening and improving cooperation on a wide range of serious international crimes between EU countries[208]. In relation to international child abduction, however, it has been argued that Europol is unlikely to have the capacity to handle the enforcement of abduction-related court orders, in addition to its existing workload[209]. Moreover, Europol officers have no direct powers of arrest nor are they entitled to carry out investigations in EU countries[210]. So, enforcement is left to the discretion of the various national enforcement agents, courts and police agencies, depending on the jurisdiction in which the parent obtains the court order[211]. Given Europol's focus and its lack of enforcement powers, it is unlikely to play any relevant role in the return of the child who has been wrongfully removed.

European Arrest warrant:

The Framework Decision on the European Arrest Warrant (EAW) defines this mechanism as:

> *"a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person for the purpose of conducting a criminal prosecution or executing a custodial sentence or a detention order"[212].*

An EAW may be issued for those acts which are deemed criminal offences by the law of the issuing Member State and are punishable by a custodial sentence for a maximum period of at least 12 months[213]. It depends on the national law of the issuing state whether the act in question and other circumstances of the case can give rise to issuing an EAW[214]. Interestingly, the Framework Decision makes a long list of offences for which the requirement of double criminality is abolished, including kidnapping[215]. However, an EAW in cases of child abduction still needs the double criminality requirement to be fulfilled[216].

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[208] Europol, *Europol: Helping EU countries fight international crime and terrorism*, 2015. [Available at: http://www.europarl.europa.eu/news/en/headlines/security/20151130STO05256/europol-helping-eu-countries-fight-international-crime-and-terrorism].

[209] Galdos, A., "When a Stranger isn't the danger: International child abduction and the Necessity of Mandatory Preventive Measures in the European Union", 2017, p. 1001. [Available at: https://www.gwilr.org/wordpress/wp-content/uploads/2017/09/IRL-Vol-49.4_Alexandra-Galdos.pdf].

[210] *See* Europol, *supra* note 208.

[211] *See* Galdos, *supra* note 209, at 997.

[212] *European Council framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States* (2002/584/JHA) - Art. 1(1). [Hereinafter: Framework Decision].

[213] Ibid., Art. 2(1).

[214] European Parliament, Committee on Petitions, *Notice to Members: Petition No 1156/2013 by Giannopoulos Konstantinos (Greek) on Child Custody,* 2015, p. 4. [Available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-537.224+04+DOC+PDF+V0//EN].

[215] *See* Council Framework Decision, *supra* note 212, Art. 2(2).

[216] Eurojust, "Report on Eurojust's casework in the field of the European Arrest Warrant (2014–2016)", 2017, p. 7. [Available at: http://www.eurojust.europa.eu/doclibrary/Eurojust-

In fact, several EAW cases involve executing authorities that refused to surrender. For example, some authorities stated that the abduction did not constitute an offence under the executing Member State's law[217]. A case that can adequately illustrate this scenario is *Tonello v. Hungary*[218], which is about a mother who abducts her young child from Italy to Hungary and absconds with her. After several attempts of the Italian police and Central Authorities to discover where the child was located, the Italian competent issued an EAW against the mother for the offence of international child abduction. The Hungarian authorities refused to surrender arguing that the requirement of dual criminality was not satisfied[219]. According to Article 2(4) of the Framework Decision[220], this is a completely acceptable response to give, as child abduction does not appear in the list of offences exempted from the dual criminality requirement. However, when the Italian court estimated that the offence of the mother had reached a degree for which it could be classified as kidnapping under the Italian Criminal Code, it issued another EAW for the said offence. In turn, the Hungarian authorities declared it not enforceable because:

> *"the conduct described in the criminal complaint could be classified as kidnapping under the Italian Criminal Code, but not under Article 190 of the Hungarian Criminal Code"*[221].

This argument, and the following inaction of Hungarian authorities, can be deemed in violation of Article 2(2) of the Framework Decision[222], as it clearly states that the offences listed must be

> *"punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State, shall, under the terms of this Framework Decision and without verification of the double criminality of the act, give rise to surrender pursuant to a European arrest warrant".*

Other cases of EAW issued in relation to international child abduction[223] have reported a lack of compliance on the side of the executing Member State's authorities. This means that, for an EAW to be effective in cases of child abduction, Article 2(2) should definitely include such offence among the ones for which the double criminality is not a requirement. Furthermore, competent authorities should be appropriately trained on how to act upon receipt of an EAW from another Member State, as recognised by European Parliament Research Service[224].

> *SIRENE (Supplementary Information Request at the National Entries):*

The System assists the competent authorities in Europe to preserve internal security in the absence of internal border checks. In particular, among its aims, there is the protection of vulnerable persons including children at risk of abduction[225]. Each Member State operating SIS has set up a national SIRENE Bureau, operational 24/7, that

framework/Casework/Report%20on%20Eurojust%20casework%20in%20the%20field%20of%20the%20EAW%202014-2016%20(May%202017)/2017-05_Eurojust-EAW-Casework-2014-16_EN.pdf]

[217] ibid.

[218] *See Tonello, supra* note 1.

[219] *Ibid.,* para. 25.

[220] *See* Council Framework Decision, *supra* note 212, Art. 2(4).

[221] *See Tonello*, *supra* note 1, para. 37.

[222] *See* Framework Decision, *supra* note 212, Art. 2(2).

[223] *See* e.g.*: Stochlac v. Poland* (App. no. 38273/02); *Shaw v. Hungary* (App. no. 6457/09).

[224] European Parliament Research Service, "Revising the European Arrest Warrant: European Added Value Assessment accompanying the European Parliament's Legislative own-Initiative Report", 2014, p. 22. [Available at: http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/510979/IPOL-JOIN_ET(2013)510979_EN.pdf].

[225] European Commission, *Schengen Information System*, [Available at: https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen-information-system_en].

is responsible for any supplementary information exchange and coordination of activities connected to SIS alerts. This system can be used also in support of the transmission of an EAW, as established by the Framework Decision[226]. SIS enables competent national authorities, such as the police and border guards, to enter and consult alerts on persons or objects. In the case of child abduction, the insertion of the name of the offender and the child in the SIRENE database has to be specifically requested by the person reporting the abduction[227]. Importantly, SIRENE is also used as a prevention mechanism in cases of strong suspicions that a child will be wrongfully removed or retained in another country by the other parent[228].

4.2.2. International

Interpol:

Interpol can play a constructive and helpful role in locating abducted children. Securing arrangements with Interpol are considered necessary not just for emergencies, but also because of the global operation of the Convention. Globally, different time zones and hemispheres mean that sunrise in one part of the world means sunset in another[229]. However, it is important to state that Interpol is not a supranational law enforcement agency and has no agents who are allowed to make arrests, as is the case of Europol. Instead, it is an international organization that functions as a network of criminal law enforcement agencies from different countries.[230]. Interpol mainly works on the basis of colour-coded notices that enable countries to share alerts and requests for information worldwide.

There are seven different colour-coded notices that address different issues and they are regulated by detailed Rules on the Processing of Data[231]. The most relevant for international child abduction are the red and the yellow notices. The red notice is to seek the location and arrest of wanted persons for prosecution or to serve a sentence[232]. According to Article 83(2)(b)(v) of the Rules the legal basis for a red notice is an arrest warrant or court order issued by the judicial authorities in the country concerned. Importantly, the red notice is not always issued by the home country of the individual, but rather the country where the crime was committed[233]. Differently, the yellow notice is a global police alert for a missing person. It is published for victims of parental abductions, criminal abductions (kidnappings) or unexplained disappearances[234]. For a yellow notice to be issued it is not necessary to institute criminal proceedings, and this is seen as one of the main benefits of using Interpol services for international child abduction[235]. These kind of notices are of pivotal importance for the location of a child who

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[226] *See* Council Framework Decision, supra note 212, Art. 9.

[227] Ministero della Giustizia, *Sottrazione internazionale di minori e tutela dell'esercizio del diritto di visita*, 2018. [Available at: https://www.giustizia.it/giustizia/it/mg_2_5_10.wp].

[228] ADIANTUM, "Vademecum: cosa fare in caso di sottrazione internazionale di minore", 2014. [Available at: http://www.adiantum.it/public/3596-vademecum--cosa-fare-in-caso-di-sottrazione-internazionale-di-minore.asp].

[229] UNDCP Informal Expert Working Group Report on Mutual Legal Assistance Casework Best Practice, Vienna, 3-7 December 2001, p. 8 [Available at: https://www.unodc.org/documents/legal-tools/lap_mlaeg_report_final.pdf].

[230] Child Abduction Recovery International, "Interpol and International Parental Child Abduction", 2019. [Available at: https://childabductionrecovery.wordpress.com/2019/01/12/interpol-and-international-parental-child-abduction/].

[231] Interpol, *Rules on the Processing of Data*, [III/IRPD/GA/2011 (2016)]. - [Hereinafter: the Rules] [Available at: https://www.interpol.int/en/How-we-work/Notices/About-Notices].

[232] Interpol, *About Notices*, [Available at: https://www.interpol.int/en/How-we-work/Notices/About-Notices].

[233] *See* Interpol Rules, supra note 231, Art. 83(2)(b)(v).

[234] Interpol, *Yellow Notices.* [Available at: https://www.interpol.int/en/How-we-work/Notices/About-Notices].

[235] *See* HCCH GGP1, *supra* note 127, at 48.

risks to be/has been abducted abroad as they give high international visibility to the case and abducted/missing persons are flagged to border officials, making travel difficult[236].

4.3. Chapter 4 Findings

This chapter has discussed the main purposes of criminal law in relation to child abduction and found that criminal proceedings can successfully contribute to the return of the child to her country of habitual residence.

In the first section, it has been argued that criminal law can enhance the Hague Convention objectives through retribution, specific deterrence, incapacitation and prioritization. For the purpose of retribution, sanctions are necessary but should not be disproportionate. For example, custodial sentences should not be imposed on parents with dependent children. This means that alternative sanctions to detention may still work as a fair punishment. In fact, also in terms of its deterrent effect, criminal law can be effective if it adds to the Hague Convention measures. This means that it should aim at specifically deter abductors by sanctioning all of them, with no exception. But still, penalties should not include custodial sentences, save in exceptional.

The approach to the aims of restoration and prioritization, instead, must be different. This is because to reach the desired objectives, the law must provide for coercive measures to be implemented when necessary. As far as concerns restoration, incapacitation measures such as arrest or detention, are unavoidable in order to be functional. This is because they would be used only in the case in which the restoration measures of the Hague Convention (i.e. civil court orders) fail. The same can be said for the aim of prioritization, when the child is hidden by the taking parent and for enforcement of court orders. However, prioritization can also be used to prevent an abduction to take place. In these cases, it is enough to use information systems to inform the police that a particular person must be stopped if identified. No criminal sanctions are needed.

The second section has discussed the available international law enforcement mechanisms in Europe and has shown that criminal proceedings can enhance the chances of the child's return to some extent. Both Europol and Interpol are useful cooperation mechanisms but, despite their definition as 'law enforcement organizations', their role is limited to locating a person, spread the information and monitor his/her movements. This is not to say that they do not play a relevant role, but rather that they probably only realise the criminal law aim of prioritization/visibility, promoting at the same time the fulfilment of the other purposes. Interestingly, though, the institution of criminal proceedings can activate an Interpol red notice, which aims at locating the parent who is absconding or fleeing from the country where the child is requested. Similarly, SIRENE does not require the institution of criminal proceedings for an alert on a missing person (such as an abducted child). However, this mechanism has the added value of working as a prevention/deterrent tool to stop a person in the act of internationally abducting a child without the need of criminal proceedings. Finally, The EAW has a substantial potential in reaching the aims of restoration through incapacitation. The EAW is the only mechanism whose authorities have the power to arrest, detain and take the offender in the hands of the competent authorities who would establish the appropriate sanction for his/her crime. However, the cooperation with the authorities in executing States has often proved difficult, decreasing the efficiency of such mechanism.

From the analysis of the above-mentioned mechanisms, the aim of retribution is always left entirely to Member States, while the others are facilitated by the help of said mechanisms. In other words, it is the national law that establishes what acts to criminalise and when to prosecute them with what sanctions. This means that States are responsible for finding an adequate trade-off between the general purposes of criminal law and the criteria that criminal sanctions must meet in order not to constitute an obstacle for the child's return. In fact, the paper is now turning to the analysis of two case studies that will illustrate how national laws adapt to these requirements.

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[236] *See* Interpol, *supra* note 234.

5. Case Studies

This chapter is going to examine two case studies: Italy and the United Kingdom. Both countries criminalise international child abduction but while the former is a civil jurisdiction, the latter is a common law one. The paper is going to analyse these countries' national criminal laws in terms of their compliance with the criteria set out in the third chapter that reflect international standards. In so doing, the discussion will conclude with an assessment of the added value of criminal proceedings in relation to the enforcement of the child's return.

5.1. Italy

5.1.1. What constitutes a criminal offence in cases of child abduction

Art. 364 Civil Code[237] establishes that both parents have custody of the child, in the absence of an order that establishes the contrary. The parental abduction of children of less than 14 years old became an offence in 1981 under Art. 574(1) Penal Code[238]. The general character of Art. 574 lends itself to flexibility, as it states that "anyone who abducts a minor of less than 14 years old, or a mentally ill person, to a parent exercising parental responsibility [...] is punished with imprisonment from one to two years"[239]. Under Art. 574(2) the latter provision applies also in cases in which the child was abducted without her consent, thus assuming that the consent of a minor of 14 years old or less is not valid[240]. At a first look, it is clear that the vagueness of the provision gives rise to serious ambiguities. Is it referring only to outgoing cases or also to incoming ones? While the available jurisprudence seem to only provide for outgoing cases, the Chamber of the Milan Juvenile Court states that Art. 574 applies to incoming cases too, despite making no reference to case-law[241]. In this context, this paper will stick to the literal interpretation of the law which implies a criminalisation of "anyone who abducts a minor".

In both cases, the criminal offence only arises when the abduction results in a *full* 'subtraction' of the child from the supervision of the other, so to prevent him/her from exercising custody rights and the educational function conferred to all parents by law, in the best interests of the child and in those of the society[242]. As far as concerns the substantive aspect, it should be noted that child abduction is constituted by two more specific offences, as it does not only violate the right of the other parent to exercise parental responsibility, but it also violates the right of the child to maintain personal relations and direct contact with both parents[243]. Importantly, under this provision, criminal proceedings can only be instituted when the left-behind parent reports the offence, and within six months from the wrongful removal or retention[244].

In 2009, Article 3(29)(b) Law n. 94[245] established the creation of Article 574(2), which was supposed to criminalise the wrongful removal or retention of a child with the aggravating factor of conducting her abroad[246]. The provision

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[237] Italian Civil Code, Art. 364 [Hereinafter: C.C.].

[238] Italian Criminal Code, Art. 544 - personal translation. [Hereinafter: C.P.].

[239] Ibid., - personal translation - Art. 574

[240] National Center for Missing & Exploited Children (NCMEC), "Introduzione generale", 2005. [Available at: https://www.icmec.org/wp-content/uploads/2015/10/Italy-IT.pdf].

[241] Camera Minorile di Milano, "Sottrazione di minori", 2005. [Available at: http://www.cameraminorilemilano.it/2005/12/22/la-sottrazione-internazionale-di-minori/] .

[242] Suprema Corte di Cassazione, Sezione VI Penale, *Sentenza del 19 febbraio* - 27 maggio 2013, n. 22911.

[243] Martone, A., "La sottrazione dei minori tra normativa europea ed internazionale", 2012 - p. 110 [Available at: http://elea.unisa.it:8080/jspui/bitstream/10556/1013/1/tesi%20A.%20Martone.pdf].

[244] *See* C.P., supra note 238, Arts. 574(1) and 574(2).

[245] Law n. 94, 15 July 2009.

[246] Brocardi, *Spiegazione dell'art. 574 bis Codice penale*. [Available at: https://www.brocardi.it/codice-penale/libro-secondo/titolo-xi/capo-

condemns whoever abducts a child in violation of a parent's rights of custody, removing or retaining her abroad against the will of the parent, preventing *in full or in part* the exercise of parental responsibility. In this case, in contrast with Article 574, it is clear that the law applies only to outgoing cases, as the term 'abroad' is seen from a national perspective. The provision applies to children up to 14 years old and children above 14 years old provided that they have explicitly expressed their dissent, as in Article 574. However, differently from the latter article, Article 574(2) is prosecuted *ex officio*, thus without the need for the left-behind parent to report the offence[247].

5.1.2. Types and length of sanctions

Article 388(2) C.P.[248] establishes that the violation of custody rights is punishable with a prison sentence from one to three years and/or a fine, provided that the 'victim' reports to the court within 3 months. Although the law provides for a penalty of imprisonment, the alleged offender can never be arrested on the basis of a violation of custody rights because the maximum penalty is too low to qualify for a custodial sentence, as provided by Article 280(2) C.P.P.[249]. Indeed, until 2013, the latter provision established that custodial measures can only be imposed for crimes that provide for a maximum penalty of at least four years. As a consequence, also article 574 C.P. could not lead to imprisonment.

Art. 574(2) deserves special attention, as the law establishes that, unless the offender is guilty of a worse crime, the sanction is a prison sentence from one to four years. Furthermore, if the offence was committed by a parent to the detriment of the child, the sanction carries the suspension of the exercise of parental responsibility[250]. Although the provision was originally created to impose a higher penalty than Art. 574 C.P. because of the aggravating factor of conducting the child abroad, neither imprisonment nor telephone tapping are currently allowed. This is due to the fact that in 2013 Italian prisons were reported as being overcrowded[251]. As a consequence, the Parliament provided for a series of measures that attempted to empty all the detention institutions. One of these measures was the editing of Article 280(2) C.P.P. that increased the limit for the application of custodial sentences and telephone tapping (Article 266 C.P.P.). Now prison sentences are applicable only to offences sanctioned with a maximum penalty of five years, and not four, as the law provided before[252].

This change in national law is particularly interesting because it has a substantial effect on the possibility of issuing an EAW against the taking parent under Article 574(2). In fact, as mentioned in the previous chapter, according to Article 2(1) of the Framework decision, "an EAW may be issued for those acts which are deemed criminal offences by the law of the issuing Member State and are *punishable* by a custodial sentence for a maximum period of at least 12 months[253]. The fact that international child abduction is criminalized in Italian national law does not have

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iv/art574bis.html?utm_source=internal&utm_medium=link&utm_campaign=articolo&utm_content=nav_art_succ_dispositivo].

[247] *See* Law n. 94, *supra* note 245.

[248] *See* C.P., *supra* note 238,Art. 388 .

[249] National Center for Missing & Exploited Children (NCMEC), "Introduzione generale", 2005. [Available at: https://www.icmec.org/wp-content/uploads/2015/10/Italy-IT.pdf].

[250] *See* Law n. 94, supra note 245, Art. 3(29)(b).

[251] Trapella, F., "Il reato di sottrazione di minore all'estero: difficoltà di diritto interno e questioni di cooperazione europea", 2017, p.2-3. [Available at: http://m.docente.unife.it/francesco.trapella/relazioni-interventi-comunicazioni-e-attivita-didattica-a-a-2016-2017/bambini-rubati-vicenza-29-giugno-2017-relazione-trapella/RELAZIONE%20VICENZA%2029%206%202017.pdf].

[252] Ibid.,

[253] *See European Council framework Decision, supra note 212,* Art. 2(1).

any effect if it is not actually punishable (or better, prosecutable) with a custodial sentence in practice[254]. In fact, as in the case of *Tonello v. Hungary*, the preliminary-investigations judge issued EAW against the mother for the offence of kidnapping[255]. This is because the mother had absconded the child for so long that the offence qualified as kidnapping, under Article 605 C.P.. The sanction for such offence committed against a child is a minimum of three to a maximum of fifteen years of prison. Importantly, however, Article 275(4) C.P. establishes that, when the offender is a pregnant woman or a mother with dependent children of less than six years old, custodial sentences cannot be imposed. Furthermore, the provision also applies to fathers in cases in which the mother died or is in no way able to assist the children. Custodial sentences cannot be applied in the mentioned situations, unless the extremely grave circumstances of the case so require.

So, what are the sanctions applied in cases of international child abduction that fall under the provision of international child abduction (Article 574 and 574(2))? Law n. 689/1981[256] establishes the so-called 'substitute measures to detention', not to be confused with 'alternative measures to detention'. In fact, while the former are aimed at delivering the criminal law purpose of retribution, the latter are used to fulfil the rehabilitation aim of criminal law, which is not discussed in this paper because not considered relevant to the subject matter. Substitute measures to detention include semi-detention, supervised liberty and a pecuniary sanction[257]. Civil sanctions in cases of 'parental controversies' are set out in Article 709 ter and can include: a warning to the taking parent, compensation for damages or the payment of a pecuniary sanction of €5000.

Finally, it is also important to point out that Article 13 of the Italian Constitution[258] provides for provisional measures limiting personal liberty in cases of extreme necessity and urgency. These can be equated to what are generally called coercive measures. In fact, according to Article 382 C.P.P. police officers have the discretion power to arrest or stop anyone who is caught in the act of committing an offence. This is particularly relevant for the criminal law aims of restoration through incapacitation and prioritization

5.1.3. Powers of the prosecutor

As mentioned above, while Art. 574 C.P. is triggered when the left behind parent reports the offence to the prosecutor or a police officer and can also be revoked[259], Art. 574(2) is prosecuted *ex officio*. This means that no lawsuit is necessary and the prosecutor must proceed with the investigation of the offence, in accordance with Art. 112 of the Constitution which establishes the rule of mandatory prosecution. This rule is based on the principle of legality, according to which "only the law can determine who needs to be punished and who can be exempted from sanctions. This determination cannot depend on a political choice"[260]. Importantly, Art. 50 of the Criminal Procedure Code establishes that offences prosecuted *ex officio* are irrevocable, i.e. once the offence is established the case has to conclude with a sanction/measure as considered appropriate according to the law.

In the Italian system, an offence prosecuted *ex officio* will be investigated by the prosecutor without the need of a complaint, but this does not mean that every single offense will be prosecuted, also depending on the circumstances of the case. In fact, the prosecutor will examine the case and see if the requisites for its dismissal are fulfilled. These requisites are set out in Arts. 408, 410, 411 e 415 C.P.P. but the one that mostly affects the

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[254] *See* Trapella, *supra* note 251, at 2-3.

[255] *See* Tonello, *supra* note 1, para. 37.

[256] Law n. 689 del 24 novembre 1981.

[257] Law n. 689 del 24 novembre 1981 - Art. 53.

[258] Italian Constitution - Art. 13.

[259] La Stampa, "Denuncia e Querela", 2010. [Available at: https://www.lastampa.it/2010/02/05/italia/denuncia-e-querela-vv6b6oFstLBxo6p1UlY5pI/pagina.html].

[260] Civitelli, S., "L'obbligatorietà dell'azione penale", [Undated] [Available at: https://www.tesionline.it/appunto/L'obbligatorietà-dell'azione-penale/260/167].

archiving of criminal proceedings for international child abduction is Art. 131(2) C.P., that was introduced with Law n. 67/2014 mentioned above[261]. To make sense of it, it is necessary to mention what Article 131(1) provides. Art. 131(1) C.P. states that, due to the *minor* and *occasional* nature of the offence, the provisions that establish a maximum penalty of less than five years of imprisonment shall not lead to custodial sentences. However, Art. 131(2) provides that the offence cannot be considered minor in nature if, *inter alia*, the offender has taken advantage of the conditions of low capacity of defence of the victim, also referring to his/her age. Again, the law looks contradictory, as Art. 131(2) seems to exclude international child abduction from being a 'minor offence'. From the jurisprudence, however, Art. 131(1) seems to prevail on Art. 131(2) in cases of international child abduction[262]. Thus, these cases are usually dismissed because considered 'minor offences', i.e. not worthy of a prosecution.

In fact, unsurprisingly, Italian law does not make any reference to the recognition and enforcement of undertakings. Neither it provides for courts to be able to accept such promises.

In relation to the third criteria, that requires the prosecutor to be empowered with a degree of discretion to adapt to the circumstances of the specific case, the prosecution *ex officio* emerges as inappropriate.

5.1.4. Compliance with the criteria set out in Chapter 3

This section has explained how the Italian legal system works in terms of criminal proceedings against the taking parent in cases of international child abduction. This paragraph is going to assess whether Italian criminal law meets the criteria that allow it not to constitute an obstacle for the return of the child.

The first criteria (i.e. no imprisonment of primary carers) can be said to be 'absorbed' by the second one. This is because, neither Article 574 nor Article 574(2) can lead to custodial sentences for the taking parent, whether it is a primary carer or not. This allows the Italian criminal law system to only partly fulfil the second criteria (i.e. providing for a range of sanctions from moderate to severe). The moderate sanctions provided by the law, for outgoing cases, vary from the payment of fines to 'substitute measures to detention' which do not imply any separation between the taking parent and the child. As far as regards more severe measures, the law establishes the use of coercive measures such as the arrest of the taking parent only in emergency situations. However, concerning severe sanctions, the threshold to be reached to trigger a custodial sentence is arguably too high. Said threshold is only reached when international child abduction turns into a kidnapping. While it is true that abduction is essentially a kidnapping, the legal wording of the latter assumes a very high degree of wrongful behaviour, which is applicable in very few cases. As a consequence, also the issuing of an EAW is possible, but becomes unlikely. So, while the first criteria is fully fulfilled, the second criteria is arguably not fully fulfilled.

In terms of the third criteria (i.e. empowering the prosecutor with discretion) the scenario is ambivalent. While the prosecution *ex officio* is not flexible by nature, the fact that the offence of international child abduction cannot lead to custodial sentences avoids the discretion aspect all together. Indeed, the fact that the left-behind parent is not able to influence the prosecution of the taking parent does not make much of a difference. In the unlikely case in which it is considered necessary to condemn the taking parent, the discretion on the sanctions to apply in each case are left to the judge. As far as regards undertakings, given the system's lack of flexibility, they are neither recognized nor enforceable, according to the law.

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[261] Schema di Decreto legislativo recante "Disposizioni in materia di non punibilità per particolare tenuità del fatto, a norma dell'art. 1, comma 1, lett. m, della legge 28 aprile 2014, n. 67", [Available at: http://www.sentenze-cassazione.com/wp-content/uploads/2015/03/TenuitadelFatto.pdf].

[262] *See* e.g.: Corte d'Appello di Venezia, *Sentenza dell' 11 ottobre 2013, n. 1420, L.*.

5.2. England and Wales

Before starting the discussion on criminalization of international child abduction in England and Wales, it is interesting to note that, according to the Children Act 1989, when a child's parents are married, they both have parental responsibility. When the father is not married to the mother, he does not have parental responsibility simply by being the father, but he may acquire it either by a court order or by formal agreement with the mother (parental responsibility agreement). Since 1 December 2003 if both parents are present when the birth of the child is registered, an unmarried father will then acquire parental responsibility for his child[263]. As a consequence, this makes the offence less clear for the general public, and more parents are probably unaware of the circumstances under which they can take unilateral decisions about the residence of the child or not.

5.2.1. What constitutes a criminal offence in cases of child abduction

England and Wales have made international child abduction a crime with the Child Abduction Act 1984[264]. According to its Section 1, the offence of child abduction, applies to children under the age of 16 and is defined narrowly where the abductor is the child's parent. Indeed, a parent will only commit the offence where she/he "takes or sends the child out of the UK without appropriate consent". By contrast, a person not connected with the child is guilty of the offence if he takes or detains' the child "so as to remove him from the lawful control of any person having lawful control of the child or so as to keep him out of the lawful control of any person entitled to lawful control of the child"[265]. Interestingly, the leading judgment of *R (Nicolaou) v Redbridge*[266] reveals that once consent has been given to take a child outside the UK even for a limited time, it is not an offence under the Act if that child is subsequently detained beyond the agreed time. In that case the judge argued that this is because "taking out of the UK" is not to be interpreted as a continuing activity[267]. From this consideration, it can be argued that under the Child Abduction Act, the offence of international child abduction only arises in case of a wrongful removal, and not in the case of a wrongful retention. This appears to be a gap in the law, and it has been suggested to amend the child abduction offence so as to criminalise wrongful retention in addition to the initial act of removal[268].

A further relevant criminal offence in England and Wales is represented by the 'Common law offence of kidnapping one's own child'. 'Common law offence' refers to an offence of the common law which has been developed entirely by the courts and for which there is no actual legislation[269]. This offence has been more clearly defined in the case of *Regina v. D.*[270], in which the House clearly outlined the criteria that an offence must fulfil in order to be considered 'kidnapping'. First, the taking or carrying away of one person by another; second, by force or by fraud; third, without the consent of the person so taken or carried away; and fourth without lawful excuse[271]. However, this definition has been identified as problematic by the Law Commission on three grounds: a) the elements of the

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[263] Morley, J. D., "Notes on English Child Abduction Law" [undated]. [Available at: https://www.international-divorce.com/ca-england.htm].

[264] Child Abduction Act 1984.

[265] *See* Schuz, *supra* note 96, (see page according to footnotes 67,68,69).

[266] *R (Nicolaou) v Redbridge*, Magistrates' Court [2012] England and Wales High Court 1647 (Admin).

[267] *See* Directorate General, *supra* note 95, at 381.

[268] Law Commission, "Simplification of the Criminal Law: Kidnapping and Related Offences", 2014. [Available at: https://www.lawcom.gov.uk/project/simplification-of-the-criminal-law-kidnapping-and-related-offences/]

[269] Alistair McDonald Q.C., "Clarke, Hall and Morrison on Children", Issue 86 November 2013, [Available at: https://heinonline-org.ezproxy.leidenuniv.nl:2443/HOL/Page?lname=&public=false&collection=journals&handle=hein.journals/lwtch3&men_hide=false&men_tab=toc&kind=&page=39&t=1561657915].

[270] See *Regina v D.* [1984] AC 778.

[271] Ibid.

offence overlap, and their relationship to one another is unclear. For instance, it is unnecessary to have both a force or fraud requirement and a requirement of absence of consent; b) the meaning of 'deprivation of liberty' is not clear. For instance, does the loss of liberty have to occur while the victim is being taken or carried away, or is it enough that the victim is first taken to a place and then confined there?; c) The relationship between kidnapping and false imprisonment is poorly defined under current law[272]. There have been various projects to make kidnapping a statutory offence based on a defendant's intentional use of force in order to compel the victim to accompany the defendant[273]. However, these projects appear to have not yet succeeded, as kidnapping is still a 'common law offence'.

5.2.2. Types and length of sanctions

The penalty for committing an offence under Section 4 of the Child Abduction Act 1984 in England and Wales is imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both such imprisonment and fine, on summary conviction. While on conviction on indictment the offender is liable to imprisonment for a term not exceeding seven years, the law also specifies that "no prosecution for an offence under section 1 shall be instituted except by or with the consent of the Director of Public Prosecutions (DPP)"[274]. This is due to the general policy of English law that parental disputes about the care of children should be pursued in civil rather than criminal proceedings. The civil court can make orders regarding arrangements for a child's care under the Children Act 1989[275]. Where a child is taken away in breach of such an order, the normal sanction will be proceedings for contempt of court[276]. It is for this reason that the consent of the Director of Public Prosecutions is required in order to prosecute a parent for abducting a child[277].

It can be said that in English law, civil and criminal sanctions constitute a continuum. In the words of the Sentencing Council, "a custodial sentence must not be imposed unless the offence [...] was so serious that neither a fine alone nor a community sentence can be justified for the offence"[278]. In fact, there is no general definition of where the custody threshold lies. Given the common law traditional rule of precedents, the Sentencing Council has issued offence-specific guidelines for most of the high volume of criminal offences sentenced by courts in England and Wales, to promote consistency. However, no guideline has yet been published for the offence of child abduction[279]. The sentencing Council established that where no offence specific guideline is available to determine seriousness, the harm caused by the offence, the culpability of the offender and any previous convictions will be relevant to the assessment[280]. This means that, essentially, it is the competent judicial authority who will decide on the sanction to be imposed, by virtue of its discretion.

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[272] *See* Law Commission, *supra* note 268, at 32.

[273] Ibid., at 2.

[274] Child Abduction Act 1984, section 4.

[275] Children Act 1989 - s. 8.

[276] *M v M* (contempt: committal) [1992] 1 FCR 317, [1992] Fam Law 14.

[277] The Law Commission, "Child Abduction", 2011, para. 2.8. [Available at: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc355_summary_child_abduction.pdf].

[278] Sentencing Council, "Imposition of Community and Custodial Sentences Definitive Guideline", 2017, p. 7. [Available at: https://www.sentencingcouncil.org.uk/wp-content/uploads/Imposition-definitive-guideline-Web.pdf]

[279] Ministry of Justice, "General Sentencing Guidelines for Use where there is no Offence Specific Guideline", 2018. [Available at: https://consult.justice.gov.uk/sentencing-council/generic-sentencing-guideline-for-use-where-there-i/].

[280] Sentencing Council, "Imposition of Community and Custodial Sentences Definitive Guideline", 2017, p. 7. [Available at: https://www.sentencingcouncil.org.uk/wp-content/uploads/Imposition-definitive-guideline-Web.pdf].

Interestingly, in the case of *R v Kayani*[281]*,* Lord Judge Chief Justice (as he then was) stated that the sentencing options in relation to child abduction are inadequate because too low. On the same line, in *R v Solliman*[282], the judge held that there are cases where it is appropriate to charge a parent with kidnapping, and that previous authority to the contrary should no longer be considered good law. This seems a harsh statement given that the maximum penalty for kidnapping is life imprisonment. Kidnapping is defined as a 'specified offence' under Part 5 Chapter 12 of the Criminal Justice Act 2003[283] and thus allowing extended prison sentences. However, as mentioned above, to charge a parent with kidnapping the consent of the DPP is needed[284]. The question of criminal sanctions for parents in cases of child abduction in England remains blurred.

What is known is that, when making any decision affecting children, the child's welfare must be the court's primary consideration, according to Section 8 of the Children Act 1989[285]. When determining whether an order is in the child's best interests, the court must consider the welfare checklist set out in section 1(3) of the CA 1989. Importantly section 1(3)(f) the court shall have regard to "how capable each of [the child's] parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs"[286]. Thus, it can be argued that in the case in which the child's primary carer faces a custodial sentence, the court will decide on it depending on whether the other parent (or other relatives) are able to meet the child's needs. As far as it concerns the jurisprudence available involving the sentencing of a primary carer an example is represented by the case of *R. v. Petherick*. In this instance, the judge stated that although "there is no standard or normative adjustment for having dependent children, their best interests are a distinct consideration to which full weight must be given"[287].

Finally, concerning coercive measures in incoming child abduction cases, Section 24 of the Police and Criminal Evidence Act 1984[288] regulates the use of arrest without warrant. Section 24(1) establishes that, on summary arrest, the police can act against: (a) anyone who is about to commit an offence; (b) anyone who is in the act of committing an offence; (c) anyone whom he has reasonable grounds for suspecting to be about to commit an offence; (d) anyone whom he has reasonable grounds for suspecting to be committing an offence. Furthermore, under Section 125(4) of the Magistrates' Courts Act 1980, the police can arrest anyone "in connection with an offence". Both types of arrests can be considered highly useful in international child abduction cases both for physical deterrence and incapacitation in very serious cases. In outgoing cases instead, for the issuing of an EAW, the penalties provided for the offence of international child abduction allow the resort to such a measure. This is because, as already mentioned, an EAW "may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months"[289]. However, the possibility of issuing an EAW completely lies in the discretion of the Crown Prosecution Service (CPS) as it will determine the appropriate sanction to be imposed on a case-by-case basis[290].

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[281] *R v Kayani* [2011] EWCA Crim 2871, [2012] 1 WLR 1927 at [16].

[282] *R v Solliman* [2011] EWCA Crim 2871.

[283] Criminal Justice Act 2003.

[284] Child Abduction Act 1984, section 5.

[285] Children Act 1989.

[286] Ibid., s. 1(3)(f).

[287] *R v Petherick* [2012] EWCA Crim 2214 para. 19.

[288] Police and Criminal Evidence Act 1984.

[289] *See* Framework Decision, *supra* note 212, Art. 2(2).

[290] House of Commons, "The European Arrest Warrant", Briefing Paper Number 07016, 18th April 2017,

5.2.3. Powers of the prosecutor

The DPP, head of the CPS, has the last word on all the cases that are deemed prosecutable by the police investigations and/or other investigative agencies[291]. The CPS is allowed a great deal of discretion when considering whether to prosecute, and it is under no obligation to prosecute whenever a crime has been committed[292]. Without sufficient resources or facilities, it is simply not realistic to prosecute all offenders. For the CPS to bring a prosecution, there must be a 'realistic prospect of conviction'. This means that the magistrates or jury are more likely than not to convict the defendant of the charge. If there is not a realistic prospect of conviction, the case must not go ahead. If the DPP decides that there is a realistic prospect of conviction, it must then consider whether it is in the public interest to prosecute the defendant[293].

The responsibility for prosecuting or dismissing the case lies entirely in the discretion of the CPS[294]. When the CPS decides to prosecute the offence, if the 'victim' wants to drop the charges against the offender all it can do is asking for a review of the case[295]. In fact, prosecutors must continuously review each case and take account of any change in circumstances[296]. However, charges can generally not be dropped at the request of the victim, only the prosecutor can do it, provided that the case has already been examined and filed[297]. In the case in which the CPS decides to dismiss the case of parental child abduction, the main reasons are: first, the lack of evidence, taking into consideration how the defence may counter the evidence and decide that there is not sufficient proof to proceed; second, the lack of probable cause for arrest. Police officers, when investigating a case must, in fact, show the probable cause for arrest. If this is not proved, charges may be dropped[298].

Concerning undertakings, English law codifies these measures and provides both for their use by English courts and for their recognition and enforcement when ordered from abroad. In the country, undertakings are recognized as legally binding promises made to the court. Under Section 72 of the Immunities, Undertakings and Agreements under the Serious Organised Crime and Police Act 2005[299] the DPP is authorized to give 'restricted use undertakings' which have to be given in writing and allow the victim to drop charges against another person. A breach of an undertaking is not a criminal offence. The person in breach will, however, be in contempt of court under Rule 37(4) of the Family Procedure Rules[300]. It is therefore still enforceable. The victim of the violation can seek to have the person in breach committed to prison or fined for contempt of court. This requires an application to the court, so it is not automatic. If the person is found to be in breach, then he/she can be imprisoned for up to two years or be fined an unlimited amount[301].

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[291] Laver, N., "The Director of Public Prosecutions", [undated]. [Available at: https://www.inbrief.co.uk/legal-system/director-of-public-prosecutions/].

[292] CPS, "The decision to charge", 2017. [Available at: https://www.cps.gov.uk/publication/decision-charge].

[293] CPS, "The decision to charge", 2017. [Available at: https://www.cps.gov.uk/publication/decision-charge].

[294] Code for Crown Prosecutors, para. 3.6.

[295] Gov.UK, *After a crime: your rights*, [Available at: https://www.gov.uk/your-rights-after-crime].

[296] Code for Crown Prosecutors, para. 3.6.

[297] Bagnato, J., "Why would Criminal Charges be Dropped or Dismissed?", [undated]. [Available at: https://www.yourphiladelphialawyers.com/criminal-charges-dropped-dismissed/].

[298] Fitch and Stahle Law Office, "Common Scenarios When Criminal Charges Are Dropped", [undated]. [Available at: https://www.fitch-stahlelaw.com/common-scenarios-when-criminal-charges-are-dropped].

[299] Immunities, Undertakings and Agreements under the Serious Organised Crime and Police Act 2005

[300] Family Procedure Rules [Available at: http://www.justice.gov.uk/courts/procedure-rules/family/parts/part-37-applications-and-proceedings-in-relation-to-contempt-of-court#para37.4].

[301] Hawkins Family Law, "What Is the Difference Between A Court Order and An Undertaking?", 2019. [Available at: http://www.hawkinsfamilylaw.co.uk/default.asp?contentID=757].

5.2.4. Compliance with the criteria set out in Chapter 3

This section has analysed the criminal law of England and Wales concerning the offence of international child abduction. Now, it will be assessed whether the practice of this State complies with the criteria that criminal law should meet not to constitute an impediment for the return of the child.

The first criteria (i.e. no imprisonment for primary carers), at a first look, can seem problematic, because the criminal laws on child abduction do provide for imprisonment and judicial authorities do apply this measure. However, as established by the Children Act 1989, judges usually do give full consideration to the best interests of the child when taking decisions that affect them. Moreover, as stated below, the prosecutor's discretion powers would allow tailoring sanctions to the circumstances of each case. As a consequence, there is no reason why the judicial authorities should decide to imprison a primary/sole carer disregarding the fact that she/he has dependent children, and the other parent is unable to care for them.
The second criteria (i.e. providing for a range of sanctions from moderate to severe) can be said to be fulfilled with the 'help' of civil sanctions. Civil sanctions provide for the most moderate sanctions in the form of fines and they are the ones more often applied in cases of child abduction. Criminal sanctions, instead, provide for the more severe ones, namely community service, coercive measures and custodial sentences. Community service can be regarded as a good intermediate measure as it does not necessarily separate the taking parent from the child but it still fulfils the retribution aim of criminal law. Coercive measures are also in line with international standards, as they can be applied not only against a taking parent who is taking the child abroad and is caught in the act, but also to parents who have wrongfully removed their child to England. In the latter case, the criminal law aim of restoration (through incapacitation) is realised. Furthermore, there are no legal impediments for the issuing of an EAW, as the child abduction offence provides for a maximum of seven years imprisonment. It is only up to the prosecutor to decide in what cases to issue it. Finally, as far as regards custodial sentences, it is not clear when these are imposed. The Sentencing Guidelines only state that it depends on the degree of seriousness of the case, without specifying any threshold.
The third criteria (i.e. empowering the prosecutor with discretion) can also be said to be fully complied with. The prosecutor has discretion on whether to prosecute an offence or not allowing it also to tailoring sentences to the circumstances of the individual case. In this scenario, it is unsurprising that undertakings are used, recognized and enforced.

5.3. Chapter 5 Findings

This chapter has discussed two very different legal systems: the Italian and the English one. By showing their level of compliance with the criteria that criminal law should meet not to impede the return of the child, this section has shown the added value of the criminalization of child abduction.

The Italian system fulfils the first criterion by virtue of the second. This is because if custodial sentences are not provided for the offence of child abduction by law, the primary carer cannot be imprisoned. In this sense, the second criterion is complied with in as far as regards moderate sanctions. Concerning severe sanctions, the law establishes the use of coercive measures such as the arrest of the taking parent, only in emergency situations. However, due to the impossibility of sentencing a parent for child abduction, a European Arrest Warrant cannot be issued for this offence. To do so, the offence must pass the threshold of kidnapping, which has a much higher level of culpability under national law. Finally, the third criterion is also fulfilled by virtue of the fact that no custodial sanctions can be imposed, so the lack of discretion of the prosecutor does not really have an impact. Given the ex officio prosecution of the offence, it is understandable why undertakings are not accepted. As a consequence, it can be concluded that the added value of criminalization on the return of the child in Italy is merely retributive. However, the presence of coercive measures strengthens the enforcement of the restoration purpose of the Hague Convention.

The English system, instead, fulfils the first criterion in as far as the law provides that judges should give full consideration to the best interests of children when taking decisions that affect them. As a consequence if, in considering the conditions of family life of the child, they see that return would cause them psychological harm or otherwise place them in an intolerable situation due to the imprisonment of the taking parent, they would not order the return. The second criterion can also be said to be fulfilled. In fact, English law provides for a range of moderate sanctions provided by civil law, in the form of fines. Criminal law provides for more severe sanctions such as community service, coercive measures and custodial sentences. These sanctions can be applied on a case-by-case basis, by virtue of the discretion that the prosecutor is empowered with. Moreover, protective measures, and in particular undertakings are clearly codified in the law, which also provides for sanctions in case they are not respected. As a consequence also the third criteria is fully complied with. This means that criminalization of child abduction impacts the child's return by adding a retributive and prioritizing character to the civil law remedies. Furthermore, it strengthens the deterrent and restorative purpose of the Hague Convention system.

6. Conclusions and Recommendations

This paper has found that the potential impact of criminalization of child abduction on the return of the child to her country of habitual residence is positive. However, the extent to which criminal law will actually influence the child's return in practice depends on the national criminal law of each State. In fact, this paper has shown that, at a minimum, criminalization adds a retributive approach to the civil solution of return and its deterrent and restoration purposes (case of Italy). This means that the traditional aim of criminal law is still the predominant one. However, in principle, its functionality in cases of child abduction either constitutes an impediment to the return of the child or it is merely an end in itself. When it constitutes an obstacle is because imprisonment is a quite easy risk to incur into. When it is an end in itself it is because the sanctions applied do not involve imprisonment. In fact, when imprisonment is not an option, the other benefit that criminalization can have, at best, is strengthening the restoration aim of the Hague Convention through the incapacitation of the taking parent for a short period of time. In fact, retribution remains the basis for the realization of the other benefits that criminalization can bring to ensure a return of the child.

The criminalization of child abduction, with the help of retribution, can add other benefits to the return of the child (as shown by the case study of England and Wales). In fact, it can deter would-be-abductors from wrongfully removing or retaining their children, if at least the threat of punishment is real, and applied when necessary. The ideal conditions to deter parents from abducting their children would be to punish every single taking parent (but not necessarily with imprisonment). However, this solution has rightly been ruled out because unrealistic. A further positive impact of criminalization on the return of the child is restoration through incapacitation, which can ensure the return of the child by providing stronger enforcement measures, in incoming cases, and further deterrence in the event of would-be-outgoing cases. Finally, the paper argues that, for the criminalization of child abduction to prioritise the offence, both at the national and international level, the availability of custodial sentences under national law is highly desirable. This is true especially when it comes to discovering the whereabouts of the taking parent and the child in the requested State. In fact, for all this series of positive contributions of criminalization, the availability of custodial sentences for the offence of child abduction can be considered as instrumental. For the sake of clarity, it is pivotal to bear in mind that these are the added values of criminal law to the civil system provided by the Hague Convention. As a consequence, it can be stated that the adequate complementarity of the elements of civil and criminal law gives rise to the ideal scenario under which the return of the child can be ensured.

The impact of criminalization of child abduction on the right of the child to maintain personal relations with both parents is tightly linked to the operation of these elements of civil and criminal law in each State. But while the return of the child can be ensured with the above mentioned enforcement measures, the right of the child to maintain personal relations with both parents does not enjoy such treatment. In fact, if the child was returned against the will of the taking parent by virtue of the use of coercive measures, the child would be separated from

him/her unless she/he decides to accompany her. On the contrary, if the return of the child was refused because she would suffer from psychological harm or otherwise be placed in an intolerable situation upon return, due to a separation from the primary carer, Article 13(1)(b) would protect their relationship. But again, the right of the child to maintain personal relations with both parents would not be realised. As a consequence, the assumption of this paper that the return of the child to her country of habitual residence creates the best circumstances for the realization of the right in question, is true only if the taking parent accompany her.

Moreover, from the analysis carried out in this paper, it can be argued that structural characteristics of different legal traditions might affect the results that the criminalization of an offence can have. The differences in legal traditions between States can alter the outcome of return proceedings, making the child's right to personal relations with both parents uncertain. Furthermore, what it is most important for the right of the child in question, is the interaction between the operations of different systems. Such interaction occurs when a child is abducted from a common law legal system to a civil law legal system, and vice-versa. In fact, while in civil law legal systems, serious crimes are prosecuted *ex officio* but can have higher thresholds for triggering custodial sentences, in common law systems, the prosecutor has discretion on all crimes and can apply custodial sentences when it considers the offence 'serious enough'. As a consequence, the return of the child is definitely better guaranteed under the common law system, because it can resort to all types of criminal law measures to enforce such return, whether the taking parent is willing or unwilling to go back. However, the right of the child to maintain contact with both parents can be said to be generally better ensured by civil law systems because of the high threshold required to impose custodial sentences. The reduced use of custodial sentences makes the Article 13(1)(b) defence less likely to be raised, while maintaining the option of the use of coercive measures in more difficult cases.

The impact of criminalization is different when it comes to very serious cases. For example, when the taking parent absconds with the child, the ready availability of severe criminal sanctions might be an advantage. When a child is abducted from a civil law country to a common law country and absconds there, the civil law jurisdiction might have to resort to criminal law cooperation systems such as Europol, SIRENE or Interpol to discover the whereabouts of the child, as they do not require the institution of criminal proceedings for their operation. Before the offence can reach a level for which a custodial sentence can be imposed to resort to the issuing of a European Arrest Warrant, it can take a considerable amount of time. As "the passage of time can have irremediable consequences for relations between the child in question and the parent who does not live with him or her"[302], the swiftness of the measures taken is pivotal. In very serious cases, indeed, both the return of the child and her right to maintain personal relations with both parents are better guaranteed when severe sentences are in place. This is because, by being extradited, the taking parent will be forced to accompany the child back to the country of habitual residence.

It can thus be concluded that the impact of the criminalization of child abduction on the right of the child to maintain personal relations with both parents is considerable, but it mainly depends on the national law of each State. This is because, depending on how criminal law is used it will have different effects. In particular the aim of retribution emerges as particularly relevant for all the other aims of criminal law. It is precisely the use of these aims that determine the impact of criminalization. However, structural characteristics of legal systems, depending on their legal tradition, have shown that in standard outgoing cases, the impact of criminalization on the right in question is positive in civil law systems but can potentially be negative in common law systems. By contrast, in very serious outgoing cases, the right of the child to maintain personal relations with both parents is better protected by common law systems. A final, but yet substantial, remark, lies in that criminalization does not neutralised the effects of the abduction, which still remains an extreme form of depriving the child and the left-behind parent of each other's company.

Recommendations to increase the child abduction criminalization positive impact on the right of the child to maintain contact with both parents, include the following. First, for civil law countries, it would be appropriate to

[302] *See Tonello v. Hungary, supra* note 1, para. 66.

either increase the penalty for the offence of child abduction, or eliminate the legal obstacle that does not allow prosecutors to resort to this measure and the connected ones. In this way, the criminal law effects of both deterrence and prioritization might be higher, but standard cases would still be dealt with moderate sanctions. This would better fulfil the right of the child in question. Second, for common law countries, to provide for a wider range of criminal sanctions, other than community service and imprisonment. In this way, the escalation to custodial sentences would be somewhat slower. Third, for civil law countries, to provide for the use, recognition and enforcement of undertakings, to ease both the return of the child and the right of the child to maintain personal relations with both parents.

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